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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 991

ALFONSO SPINELLI,
Libellant-Petitioner,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,
Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
THE OPINIONS OF THE COURTS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF THE WRIT	5
CONCLUSION	15
APPENDIX A:	
Opinion	17
APPENDIX B:	
Judgment	20

Cases Cited

Ballwanz v. Isthmian Lines, Inc., 319 F. 2d 457 (4 Cir. 1963)	10
Benjamin Noble, 244 Fed. 95 (6 Cir. 1917)	9
Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631 (1919)	10
Crumady v. The Joachim Hendrick Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413 (1959)	5, 13
Gindville v. American Hawaiian Steamship Company, 224 F. 2d 746 (3 Cir. 1955)	10
Grillea v. United States, 232 F. 2d 919 (2 Cir. 1956)	6, 7
Ktistakis v. United Cross Navigation Corp., 204 F. Supp. 293 (S. D. N. Y. 1962)	14

PAGE

Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 924, 4 L. Ed. 2d 941 (1960) 5, 7, 14

Morales v. City of Galveston, Texas, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 1226 (1962) 7, 8

Oddenes v. Universe Tankships, Inc., 188 F. Supp. 177 (1960) 14

Paliaga v. Luckenbach Steamship Company, 301 F. 2d 403 (2 Cir. 1962) 8

Puddu v. Royal Netherlands Steamship Company, 303 F. 2d 752 (2 Cir. 1962), cert. den., 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962) 13

Reed v. Steamship Yaka, 373 U. S. 412, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963) 14

Rich v. Ellerman & Bucknall S.S. Co., 278 F. 2d 704 (2 Cir. 1960) 9

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956) 10

Scott v. Isbrandtsen Co., 327 F. 2d 113 (Jan. 1964) ... 10-13

Vega v. The Malula, 291 F. 2d 415 (5 Cir. 1961) 9

Statute Cited

28 U.S.C.:

Secs. 1254(1), 2101(c) 2

IN THE

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OCTOBER TERM, 1963

No. _____

ALFONSO SPINELLI,

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ISTHMIAN STEAMSHIP COMPANY, a corporation,

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INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Alfonso Spinelli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled matter.

The Opinions of the Courts Below

The opinion of Judge EDWARD C. MCLEAN, dismissing the libel (15a) is printed in the Appellant's Appendix in the Court below, and is unreported.

The opinion of the Court of Appeals for the Second Circuit, printed as Appendix A hereto, is reported in 326 F. 2d 870.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, printed as Appendix B hereto was decided and entered on January 13, 1964.

The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether or not an unseaworthy condition for which a ship owner is held liable may be created by longshoremen in the performance of ship's work and in their method of operation.

2. Whether or not a vessel or any part thereof, including a draft, which is in an overloaded condition so as to be unsafe, is unseaworthy.

Statement of the Case

This action was brought to recover damages for injuries sustained on September 17, 1957 by the libellant, a longshoreman employee of International Terminal Operating Co. (ITO), which was engaged in loading cargo aboard the defendant's vessel, the SS STEELMAKER at Shed No. 4, Erie Basin Terminal, Brooklyn, New York (4a). He worked on the stringpiece alongside the vessel (4a). The cargo at the time consisted of steel pipes (10a). The trial court described the accident (15a):

> . . . . A draft of steel pipe which was being hoisted in a sling from the dock to the vessel fell back to the dock and struck libellant, injuring his foot. The draft

fell back because the brake on the ship's winch slipped . . . ."

The court found that in accordance with normal practice the brakes on the winch was set to hold three tons (17a). This setting was fixed and checked by the ship's electrician (16a). The loading of pipes had started at about 7:00 p.m. on the evening of the accident (17a). The trial court found further (18a):

> "Along about 10:00 P.M. the gang began to load the shorter pipes. At first they put six or seven pipes in each draft. These were hoisted and stowed away without incident. At about 10:45 P.M. the dock foreman, Tony the Gump, told the dock gang to put nine pipes in each draft. Libellant and other longshoremen protested, saying that they feared that to do so would over load the winch. Tony the Gump explained that he was the boss and that he expected his orders to be obeyed. Libellant and the others complied.
>
> "Two drafts of nine pipes each were thereafter pulled up without mishap. Then came a third draft. It was hoisted to a height of 3 or 4 feet above the dock, where it paused. This was normal, as it was the practice to hold each at this height momentarily to stop any swaying. This particular draft did not continue on its upward way, but immediately after the pause the front end of the draft came back down to the dock. The sling on the front end opened up when it hit the dock and one of the pipes came out and struck libellant on his left foot."

In reviewing the physical facts concerning the drafts lifted the court concluded (22a):

"* * *. A draft of seven of the shorter pipes is clearly within the capacity of the equipment and a draft of nine of the shorter pipes is clearly beyond it."

In dismissing the libel the court stated (23a):

"* * *. The most probable explanation of this accident is that the slipping was caused by overloading a winch which was in a sound condition, reasonably fit for its intended use, and which would not have failed if it had been properly used. This is the explanation which I adopt * * *."

In applying the law to the facts in this case, the court stated that ITO alone was negligent and its negligence was the sole cause of the injury to plaintiff (25a). As to unseaworthiness the court concluded (25a):

"The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959), relied upon by libellant so holds. In that case, the negligent operation of the stevedore 'did no more than bring into play the unseaworthy condition of the vessel' which had previously existed. Here there was no such previously existing unseaworthy condition."

On appeal to the Court of Appeals for the Second Circuit, the decree was affirmed.

Reasons for Allowance of the Writ

The decision of the Court of Appeals for the Second Circuit is erroneous and is not in accord with the decisions of this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413 (1959) and *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 924, 4 L. Ed. 2d 941 (1960).

In the case of *Crumady* v. *The Joachim Hendrick Fisser*, *supra*, this Court held a vessel liable and granted indemnity over where a longshoreman was injured. A boom fell while a load of lumber was being lifted out of a hold. The ship's equipment was specifically found to be "in good condition". However, the cut-off device on the rigging had been adjusted. The stevedoring company overloaded the boom, causing "the unseaworthy condition of the vessel" to come into play. The vessel was allowed to recover over. It is to be noted that if the stevedoring company had not been negligent, i.e., had not overloaded the boom, the vessel's equipment would have been safe for use.

In the present case also, the accident occurred when the stevedoring company overloaded the winch as a result of which the vessel's winch did not function properly. The Court below found (23a):

> "* * * The most probable explanation of this accident is that the slipping was caused by overloading a winch which was in a sound condition, reasonably fit for its intended use, and which would not have failed if it had been properly used. This is the explanation I adopt * * *"

The trial court found that the brakes on the winch were set by the ship's electrician (16a). Libellant's gang started to work at 7:00 P.M. (17a). At about 10:45 P.M., the J.T.O. foreman ordered the men to increase the load to nine pipes

(18a). Two drafts of nine pipes were pulled up without incident. As the third draft was being raised, the brakes on the winch slipped and the draft fell back, causing plaintiff's injury (18a). The Court specifically found that the "winch was overloaded because the I.T.O. foreman insisted that nine pipes be placed in the draft" (24a). The condition, therefore, was not a momentary or fleeting one.

In the case of *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956), the Court distinguished a fleeting condition which arises simultaneously with a negligent act and is part of it, from a condition which exists as a separate state for even a relatively short time on a vessel. It is not the time that the condition exists which is the significant factor; it is the distinct status of the condition.

Judge LEARNED HAND discussed the distinction at page 922:

> "* * * However, it is at times hard to say whether a defect in hull or gear that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation, which will fasten liability upon the owner only in case it is negligent, or as an unfitness of the ship that makes her *pro tanto* unseaworthy. The respondents plausibly argue, for instance, that when a strongback is dislodged by the negligence of a winchman, or of those who direct him, or when some one of the crew carelessly turns a lever that drops a boat from its davits, there is a moment, however, short, during which the ship is unfit and during which her unfitness causes the injury; yet on such occasions she is not deemed unseaworthy. On the other hand, if the wrong hatch cover had been placed over the 'pad-eye' the day before the libellant stepped on it, this ship would have been unseaworthy;"

Since the *Grillea* decision, this Court has stated definatively that since notice is not a factor in fixing liability for unseaworthiness, the time during which a defective condition exists does not control the issue in any way.

In *Mitchell* v. *Trawler Racer, Inc., supra*, Mr. Justice STEWART reviewed the nature of a shipowner's duty to provide a seaworthy vessel. He stated at page 549:

> "There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is Alaska Steamship Co. v. Petterson, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. *That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent.*" (Italics ours.)

If a longshoreman's injury is caused as a result of cargo improperly stacked by longshoremen in a hold, there would be no difficulty in finding that an unseaworthy condition existed on the vessel. In *Morales* v. *City of Galveston, Texas*, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 1226 (1962), Mr. Justice STEWART commented at page 170:

> "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her

crew unfit. *The method of loading her cargo, or the manner of its stowage, might be improper.* * * *. For any or all of these reasons, or others, a vessel might not be reasonably fit for her intended service. * * *" (Italics ours.)

Paliaga v. *Luckenbach Steamship Company*, 301 F. 2d 403 (2 Cir. 1962) is significant. In that case a longshoreman brought an action based on both negligence and unseaworthiness. He was injured when a ninety pound carton of petroleum wax fell from a draft which was being lowered into a tank with the ship's boom and winches. At the close of all the evidence the District Court dismissed the negligence claim of the plaintiff and submitted the issue of unseaworthiness to the jury on whether the vessel "was unseaworthy because there had been a failure to secure the loose carton or a failure to use a circular pallet instead of a rectangular one in the draft." The third party stevedore settled with the plaintiff before the jury came in with a verdict. The Court refused to permit the shipowner to pursue its action over following the settlement. On appeal this was reversed. However, in discussing the applicable law, Judge WATERMAN stated at page 409:

"* * * But the question of the unseaworthiness of the S.S. Edward Luckenbach was under consideration by the jury at the time of the announced settlement, and *we are told that a stevedore's breach may create the unseaworthiness of a ship or* the breach may activate a ship's pre-existing unseaworthy condition, and *in either case* as a result of the stevedore's operations the likelihood exists of the shipowner's liability to persons who stand in the shoes of seamen. Crumady v. The Joachim Hendrick Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959) * * *." (Italics ours.)

In the case of *Rich* v. *Ellerman & Bucknall S.S. Co.*, 278 F. 2d 704 (2 Cir. 1960), the plaintiff longshoreman was injured when a chassis stowed on the vessel tilted when he stepped on it. The charge of the trial court was held to be in error and a verdict for the defendant was reversed on appeal. Among other things, Judge SMITH stated at 707:

> "* * * Moreover, the portion of the charge which was intended to apply to the unseaworthiness claim may well have been understood to have been limited to structural defects in hull or gear. This was not sufficient under the circumstances here, for *the unseaworthiness claimed was the dangerous working platform consisting of the chassis in the condition in which they were left by Clark's men sometime before noon. A ship may* be unseaworthy because of improper stowage * * *." (Italics ours.)

The concept of "unseaworthiness" relates to a condition existing in or on a vessel. It is not limited to the mechanical state of specific items of ship's equipment. It relates as much to a condition created by the improper use of good equipment as it does to a condition created by mechanically defective equipment properly used. Cf. *Vega* v. *The Malula*, 291 F. 2d 415 (5 Cir. 1961). For example, a vessel, otherwise adequate, which is improperly loaded has traditionally been regarded as being unseaworthy. In the *Benjamin Noble*, 244 Fed. 95 (6 Cir. 1917), Judge WARRINGTON stated at page 97 with reference to vessels made unseaworthy by improper loading:

> "* * * This is true also of a vessel which is improperly ballasted with reference to the load it carries * * *; so as respects an improper distribution or loading of the cargo * * *; or overloading a particular part of a vessel * * *. It must follow, if it is not obvious that

> the capacity of a vessel and the tonnage of its cargo are likewise vitally related as respects the fact of unseaworthiness. In Cincinnati Firemen's Mutual Ins. Co. v. May, 20 Ohio, 212, 226, Chief Justice Hitchcock said: 'That overloading a vessel renders her unseaworthy, there can be no doubt.' • • • •"

This decision was affirmed in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631 (1919). See also *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956) where a longshoreman recovered when injured by improperly stowed cargo while unloading the vessel; *Ballwanz* v. *Isthmian Lines Inc.*, 319 F. 2d 457 (4 Cir. 1963), where a wire sling, while being hoisted, failed to hold a wooden spreader, causing it to fall into a hold; *Gindville* v. *American Hawaiian Steamship Company*, 224 F. 2d 746 (3 Cir. 1955) where a longshoreman was injured while improperly stowed cargo was being unloaded. If a vessel is unseaworthy because a particular part of the vessel is improperly loaded, it logically follows that an improperly loaded draft on the vessel's loading gear creates an unseaworthy condition.

The decision of the Court of Appeals for the Second Circuit is also in conflict with the principle recognized in the decision of the Court of Appeals for the Fourth Circuit in *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964). In that case the Court held that an unseaworthy condition may be created by "the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation."

Judge BOREMAN wrote at page 123:

> "In the case at bar, there was evidence before the jury that the procedure used by the longshoremen in dis-

charging the cargo was the usual and practical method employed in breaking down and working this type of cargo out of the stow for discharge and was reasonably safe. But there was other evidence to the effect that it took two men to safely handle a bale as it was being rolled down to or toward the cargo net; that because some of the bales were standing on end between the forward bulkhead and beams which extended from port to starboard, there was room for only one man to work; that one man could not handle a bale with safety so as to either check or direct its fall; that *an unsafe and hazardous condition resulted from going to such depth into the stow and creating the stairstep arrangement before undertaking to remove the top tier of the bales standing on end.* Thus, it is apparent that the evidence was in conflict and that different inferences could reasonably be drawn therefrom.

• • •

"In Crumady v. The Joachim Hendrick Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959), the Supreme Court, by citing the Grillea case, appears to have given at least tacit approval thereto and to the principle that stevedores themselves could render a ship *pro tanto* unseaworthy and make the vessel owner liable for injuries to one of them.

• • •

"In this circuit it is no longer open to question that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and in *their method of operation* may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable for injury to a

longshoreman resulting from such condition. This is true even though the condition be transitory and without knowledge of the ship's officers. Furthermore, contrary to defendant's argument, in determining unseaworthiness no significance attaches to the fact that no one complained of the alleged unsafe condition. We point to two fairly recent decisions of this court (and cases cited therein), namely, *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481 (4th Cir. 1960), and *Ballwanz* v. *Isthmian Lines, Inc.*, 319 F. 2d 457 (4th Cir. 1963). These cases were decided subsequent to the decision of the Supreme Court in Mitchell v. Trawler Racer, Inc., supra, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960), where a transitory slippery condition of the ship's rail was involved and it was held that a factual issue as to unseaworthiness was presented even though the condition was unknown to the ship's officers.

• • •

"In the instant case, because of the trial court's ruling as a matter of law that the plaintiff was free of contributory negligence, no issue in that respect was presented for determination by the trier of fact, but *here there was a conflict in the evidence as to whether the method used in discharging the cargo (the removal of a large number of the bales stowed in the lower tier and the creation of the steep stairstep arrangement up to the topmost tier) created such an unsafe, though transitory, condition as to render the ship unseaworthy.* The Supreme Court has made it abundantly clear that there has evolved a complete divorcement of unseaworthiness liability from concepts of negligence. The plaintiff requested the court to submit to the jury such an issue of fact as to unseaworthiness but, instead, the court instructed that if the jury believed that the longshoremen's method of operation

used in removing the cargo was the sole proximate cause of the accident, the defendant was not liable." (Italics ours.)

In the instant case, the Court of Appeals below, two months after argument, affirmed *per curiam* citing only *Puddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752 (2 Cir. 1962) cert. den. 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962). However, the *Puddu* case turned on the finding that the question of "unseaworthiness" was a factual question. *Puddu* is different from the present case. The issue in this case is a legal issue and was so regarded by the trial judge. He stated with reference to his finding that the ship was not unseaworthy (25a):

"* * * On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959), relied upon by libellant so holds. In that case, the negligent operation of the stevedore 'did no more than bring into play the unseaworthy condition of the vessel' which had previously existed. Here there was no such previously existing unseaworthy condition."

His finding is based upon the legal concept of unseaworthiness. The petitioner accepts the underlying findings of fact made by the Court but we allege that the legal interpretation of the Court of the concept of "unseaworthiness" and the *Crumady* case is wrong.

The issue presented in this petition involves a basic principle of maritime law which should be resolved by this

Court. In the decision of *Reed* v. *Steamship Yaka*, 373 U. S. 412, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963), this Court said:

> "* * * a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work."

If the loading and winch operation were in the hands of the ship's crew and a crewman was hurt rather than a longshoreman, such crewman could recover for an unseaworthy condition on the vessel even if it was a transitory condition arising out of the operation of the vessel. *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

In *Oddenes* v. *Universe Tankships, Inc.*, 188 F. Supp. 177 (1960), the plaintiff, a seaman, was injured when an eight-inch spring line slipped out of an open chock and struck him. The trial judge did not find any mechanical defect in the ship's equipment. He did find, however, at page 121:

> "I find that *the manner in which the spring line was rigged created a condition dangerous to* seamen working on the poop deck that this condition rendered the spring line *as rigged* unseaworthy * * *" (Italics ours)

In the *Oddenes* case, it was the manner in which a spring line was rigged which created an unseaworthy condition. Similarly, making up a draft so that it overloads a winch creates the unseaworthy condition.

CONCLUSION

For the above reasons a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

NATHAN BAKER,
Counsel for Libellant-Petitioner.

BAKER, GARBER & CHAZEN,
Proctors for Libellant-Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 175—September Term, 1963.

(Argued November 19, 1963 Decided January 13, 1964.)

Docket No. 28385

ALFONSO SPINELLI,

Libellant-Appellant and Cross-Appellee,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent-Petitioner-Appellee and Cross-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent-Impleaded-Appellee and Cross-Appellant.

Before:

MEDINA, WATERMAN and MARSHALL,

Circuit Judges.

Appeal from a final decree of the United States District Court for the Southern District of New York, in Admiralty, Edward C. McLean, *Judge*.

Appendix A

Libellant, a longshoreman, appeals from a final decree dismissing his libel to recover damages for injuries sustained by reason of the falling of a draft of steel pipe in a loading operation and Isthmian Steamship Company cross-appeals from a final decree dismissing its cross-claim against International Terminal Operating Co., Inc. Opinion below not reported. Affirmed in all respects.

BERNARD CHAZEN, Hoboken, New Jersey (Milton Garber and Baker, Garber & Chazen, Hoboken, New Jersey, on the brief), *for libellant-appellant.*

ROBERT P. HART, New York, N. Y. (Ralph C. Kreimer and Kirlin, Campbell & Keating, New York, N. Y., on the brief), *for respondent-petitioner.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Sidney A. Schwartz and Alexander, Ash & Schwartz, New York, N. Y., on the brief), *for respondent-impleaded-appellee.*

PER CURIAM:

Appellant Alfonso Spinelli, a longshoreman, was injured when helping to load cargo aboard the SS Steelmaker, owned by respondent-appellee Isthmian Steamship Company. The libel charges respondent-appellee with responsibility for the fall of a draft of steel pipe that was being hoisted in a sling from the pier to the vessel. The draft fell back because the brake on the ship's winch slipped and libellant-appellant was injured. The evidence ample sus-

tains the finding of the trial judge that the winch was not defective and that the accident happened because the stevedore boss changed from drafts of 6 pipes to a draft of 9 pipes, although warned that such a load was too heavy for the winch. We affirm on the authority of *Puddu* v. *Royal Netherlands Steamship Company*, 2 Cir., 1962, 303 F. 2d 752, cert. denied, 371 U. S. 840.

We affirm the decree in all respects, including the part thereof dismissing the cross-claim of the shipowner against the stevedore, International Terminal Operating Co., Inc., and involved in Isthmian's protective cross-appeal.

APPENDIX B

Judgment

(Filed—January 13, 1964)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of January one thousand nine hundred and sixty-four.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

ALFONSO SPINELLI,

Libellant-Appellant,

v.

ISTHMIAN STEAMSHIP COMPANY,

Respondent-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent-Impleaded-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to respondent-appellee Isthmian Steamship Company.

A. Daniel Fusaro,
Clerk.

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—against—

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—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

BRIEF OF THE RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INDEX.

	PAGE
The Opinions of the Courts Below	1
Statement of the Case	2
The Actual Question Presented	3
Reasons for Denying the Writ	4
(a) The Decisions of the Courts Below Are Not Contrary to Any Decisions of This Court	4
(b) The Dismissal of Libellant's Action Was in Accordance With Well-Established Law	5
(c) Certiorari Has Been Denied Under Similar Circumstances	7
(d) There Is No Conflict Between the Circuits	7
(e) The Result Here Sought by Petitioner Should Come From Congress as It Would Require a Complete Emasculation of the Longshoremen's and Harbor Workers' Compensation Act	12
Conclusion	14
Appendix R—	
Opinion of District Court	15

PAGE

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Cases:

Arena v. Luckenbach Steamship Company, 279 F. 2d 186 (1 Cir. 1960), cert. denied 364 U. S. 895 7

Beeler v. Foss Launch & Tug Company, 224 F. Supp. 814 (D. Ore. 1963) 6

Berti v. Compagnie de Navigation Cyprien Fabre, 213 F. 2d 397, 400 (2 Cir. 1954) 5

Billeci v. United States, 298 F. 2d 703 (9 Cir. 1962) 6

Castro v. Moore-McCormack Lines Inc., 325 F. 2d 72, 74-76 (2 Cir. 1963) 9

Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445 (1959) 4

Donovan v. Esso Shipping Company, 259 F. 2d 65 (3 Cir. 1958), cert. denied 359 U. S. 907 7

Ferrante v. Swedish America Line (3 Cir., Opinion April 16, 1964) 7, 8, 9, 11

Gallagher v. United States Lines Co., 206 F. 2d 177 (2 Cir. 1953), cert. denied 346 U. S. 897 7

Grillea v. United States, 232 F. 2d 919, 922 (2 Cir. 1956) 11

Harrell v. Lykes Brothers S.S. Co. Inc., 165 F. Supp. 125 (E.D. La. 1958) 6

Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, 8 (6 Cir. 1956), cert. denied 352 U. S. 941 6

Massa v. C.A. Venezuelan Navigacion, 209 F. Supp. 404 (E.D. N.Y. 1962) 6

PAGE

Mitchell v. Trawler Racer Inc., 362 U. S. 539, 80 S. Ct. 924 (1960) 4, 5

Morales v. City of Galveston, 370 U. S. 165, 170-171 (1962) 9

Puddu v. Royal Netherlands Steamship Company, 303 F. 2d 752 (2 Cir. 1962), cert. denied 371 U. S. 840 7

Royal Mail Lines, Ltd. v. Peck, 269 F. 2d 857 (9 Cir. 1959) 6

Scott v. Isbrandtsen Co., 327 F. 2d 113 (4 Cir. 1964) 6

Sullivan v. United States, 203 F. Supp. 496 (S.D. N.Y. 1961) 6

Titus v. The Santorini, 258 F. 2d 352 (9 Cir. 1958) 6

Ventrone v. United States, 239 F. 2d 862 (2 Cir. 1957) 6

Williams v. The S.S. Richard de Larrinaga, 287 F. 2d 732 (4 Cir. 1961) 6

OTHER AUTHORITY CITED:

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U. S. C. §901-950 ..... 13, 14

IN THE

Supreme Court of the United States

October Term, 1963

No. 991

ALFONSO SPINELLI,

Petitioner.

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent.

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

BRIEF OF THE RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Opinions of the Court Below

The opinion of Judge Edward C. McLean dismissing the libel is unreported and is printed as Appendix R hereto.

The opinion of the Court of Appeals for the Second Circuit, affirming the dismissal of the libel, is reported in 326 F. 2d 870, and is printed as Appendix A to the petition.

Statement of the Case

Libellant-petitioner initially claimed that a winch at the #4 hatch of the S.S. Steelmaker was defective and not reasonably fit for its intended use, and that by reason thereof he sustained injury on September 17, 1957. However, the Trial Judge rejected the testimony of the winch operator that there was a defect in the winch and instead made findings of fact that the winch and its brake were not defective, that they were in good condition, and that they were reasonably fit appliances for their intended use. They functioned well both before and after the accident, when properly used by the longshoremen with drafts of only 6 or 7 pipes. The Trial Judge found that at the time of the accident such winch was not being used either properly or for its intended purpose. It is manifest therefore, that this case as tried below, dealt solely with a libellant's claim of a defective winch.

Shortly before the accident occurred, the longshoremen's own foreman, Tony the Gump, ordered them to place 9 pieces of pipe in a draft. They did so, under protest that it would weigh too much. The Trial Judge expressly found that the longshoremen's foreman was negligent in giving such order to his men and that when the longshoremen pursuant to such order placed 9 pieces of pipe in a draft they were not using the winch in a proper manner or as it was intended to be used. The shipowner was expressly found to have had no notice, either actual or constructive, of such improper use of the winch by the longshoremen.

Significantly, the libellant-petitioner never appealed from any of the findings of fact made by the Trial Judge.

In view of the Trial Judge's undisputed findings of fact, it is apparent that petitioner is begging the question by phrasing the "Questions Presented" in the manner set forth in the petition. There was no unseaworthy condition found. On the contrary, the specific piece of equipment alleged by the petitioner to have been defective and unseaworthy was expressly found as a fact to have been in good condition and fit for its intended purpose. The basic issue, which petitioner wishes to skirt semantically, is whether a shipowner is under an absolute obligation to a longshoreman to make stevedoring an accident-free occupation.

The Actual Question Presented

Is a ship unseaworthy *as a matter of law* to a longshoreman who sustained personal injuries only because he and his co-workers performed their work pursuant to an improvident and negligent order given by their own foreman (1) where the control of the work was exclusively with the longshoremen, (2) the shipowner had neither actual nor constructive notice of the manner in which the work was being performed by the longshoremen, and (3) where the physical equipment involved, namely a winch, was in all respects sound and fit for its intended purpose and functioned well both before and after the accident when properly used for its intended purpose?

Reasons for Denying the Writ

(a) *The Decisions of the Courts Below Are Not Contrary to Any Decisions of This Court.*

Petitioner alleges that the decision of the Court of Appeals, affirming the dismissal of the District Court, is not in accord with the decisions of this Court in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, 79 S. Ct. 445 (1959) and *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, 80 S. Ct. 924 (1960).

The instant action is factually distinguishable from the *Crumady* case. Such factual distinction was well set forth by the Trial Judge as follows (Appendix R, p. 26):

> "The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1959), relied upon by libellant so holds. In that case, the negligent operation of the stevedore 'did no more than to bring into play the unseaworthy condition of the vessel' which had previously existed. *Here there was no such previously existing unseaworthy condition*". (Italics added.)

And, rather than being at odds with the *Mitchell* decision, the decision in the instant action is squarely in accord with it. For, it was expressly stated by this Court in *Mitchell* (p. 550 of 362 U. S., and p. 933 of 80 S. Ct.):

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The

duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. *The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea,* but a vessel reasonably suitable for her intended service". (Italics added.)

Thus, it is the plaintiff's underlying contention, that the shipowner is under an absolute obligation to furnish a longshoreman with an accident-free ship, which is not in accord with the decisions of this Court, rather than the decisions of the Court below. The Trial Judge's finding that the winch in question was sound and fit for its intended use obviously squares with the rule of *Mitchell.* The dismissal of libellant's claim as an accident due solely to misuse of sound equipment, under the circumstances presented by this case, also squares with the *Mitchell* principle that not every "imaginable peril" is covered by the warranty of seaworthiness.

(b) *The Dismissal of Libellant's Action Was in Accordance With Well-Established Law.*

Petitioner urges that the dismissal of libellant's action was erroneous. However, the decisions of the Courts below in reality conform to fairly well-settled law.

In *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397, 400 (2 Cir. 1954) the rule was formulated:

"If plaintiff's injuries resulted solely from the manner in which the work was done under American's (the stevedore) supervision, he has no recourse against Cyprien (the shipowner)". (Parenthetical material added.)

Similarly, as stated in *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4, 8 (6 Cir. 1956), cert. denied 352 U. S. 941:

> "The obligation of the vessel owner to provide seaworthy appliances has not been extended to require the owner to keep those appliances from being used in a negligent manner".

Other decisions in the same vein, dismissing actions for personal injuries caused solely by the negligent act of a plaintiff-longshoreman or his co-workers are *Billeci* v. *United States*, 298 F. 2d 703 (9 Cir. 1962); *Titus* v. *The Santorini*, 258 F. 2d 352 (9 Cir. 1958); *Royal Mail Lines, Ltd.* v. *Peck*, 269 F. 2d 857 (9 Cir. 1959); *Beeler* v. *Foss Launch & Tug Company*, 224 F. Supp. 814 (D. Ore. 1963); *Williams* v. *The S.S. Richard de Larrinaga*, 287 F. 2d 732 (4 Cir. 1961); *Ventrone* v. *United States*, 239 F. 2d 862 (2 Cir. 1957); *Harrell* v. *Lykes Brothers S.S. Co. Inc.*, 165 F. Supp. 125 (E.D. La. 1958); *Massa* v. *C.A. Venezuelan Navigacion*, 209 F. Supp. 404 (E.D. N.Y. 1962); and *Sullivan* v. *United States*, 203 F. Supp. 496 (S.D. N.Y. 1961).

Petitioner quotes at length from the case of *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964), but said decision is not at all apposite to the case at hand. That case dealt with the propriety of a special interrogatory inquiring whether if the stevedore was negligent such negligence, *without regard to unseaworthiness*, was the sole proximate cause of the plaintiff's accident. Such special interrogatory, completely disregarding unseaworthiness, was improper. However, it is apparent from the opinion that the Trial Judge in the instant action applied the proper standard as he considered both the negligence of the stevedore (which he found to have been the sole cause of the accident) and the unseaworthiness of the vessel (which he found not to exist).

(c) *Certiorari Has Been Denied Under Similar Circumstances.*

Additional instances in which the misuse of sound equipment by either the plaintiff or his co-workers were held to create no liability on the part of the shipowner are to be found in *Arena* v. *Luckenbach Steamship Company*, 279 F. 2d 186 (1 Cir. 1960), cert. denied 364 U. S. 895; *Puddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752 (2 Cir. 1962), cert. denied 371 U. S. 840; *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177 (2 Cir. 1953), cert. denied 346 U. S. 897; and *Donovan* v. *Esso Shipping Company*, 259 F. 2d 65 (3 Cir. 1958), cert. denied 359 U. S. 907. Plaintiffs in each of these cases sought to obtain certiorari on issues extremely similar, if not identical, to those presented in the instant case. As the citations indicate, certiorari was denied in each of those instances.

(d) *There Is No Conflict Between the Circuits.*

Petitioner asserts that the decision in *Ferrante* v. *Swedish America Line* (3 Cir., Opinion April 16, 1964) announces a rule of law directly contrary to the rule set forth by the Court of Appeals for the Second Circuit in the instant case. Close analysis of both decisions, however, reveals certain factual dissimilarities, and discloses no real conflict.

The issue presented on appeal in *Ferrante* was whether the District Court used proper legal standards in arriving at its factual findings that the ship was neither negligent nor unseaworthy. It was contended that the fact findings were clearly erroneous. Here, petitioner conceded in the Court below that the Trial Judge's findings of fact were undisputed.

In *Ferrante* the vessel's third officer initially interjected himself into the stevedoring work by cautioning the longshoremen not to make big sling loads because something might happen and break. Thereafter, it was the continuing duty of the third officer to observe the longshoremen so as to prevent damage to cargo or ship. Accordingly, the ship had actual or constructive notice of the negligent make up of the sling loads by the longshoremen. The Court of Appeals for the Third Circuit held that the Trial Judge erred in failing to take into account the principle that where a ship knows, or should have known, that the stevedore's method of discharging its cargo does not conform to the standard of reasonable care, and thereby creates a hazardous condition, the ship is negligent when it does not forbid the use of the method. It remanded the action.

In the instant case, however, there was no proof that any ship's officer had interjected himself in the work being done by the longshoremen, and there was no proof that the make up of the drafts by the longshoremen on the pier was under the observation of any ship's officer. Most importantly, the Trial Judge in the instant action has entered an undisputed finding of fact (Appendix R, p. 26):

> "10. The employees of the shipowner had no notice, actual or constructive, of the improper use of the winch by the longshoremen or of the accident".

Because of these factual differences, the *Ferrante* decision cannot be said to be in conflict with the decision in the instant case.

Additionally, it is to be noted that in discussing the standard to be applied in considering the alleged breach of the warranty of seaworthiness, the Court of Appeals

for the Third Circuit in the *Ferrante* case, *supra,* quoted as law the rule enunciated by this Court in *Morales* v. *City of Galveston,* 370 U. S. 165, 170-171 (1962):

> "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its stowage, might be improper. (Citing cases). For any or all of these reasons, or others, a vessel *might* not be reasonably fit for her intended service". (Italics added.)

The rule thus set forth by this Court, which is in reality the holding of *Ferrante,* is permissive rather than mandatory. It allows the trier of the facts to make the appropriate inferences. It is not every mishap in equipment or by men which renders a vessel unseaworthy, and the test is still one of *reasonableness.* Obviously there is thus an area in which reasonable men can differ, but such differences in the inferences to be drawn by reasonable men do not warrant an appeal or a grant of certiorari.

As was pertinently stated in *Castro* v. *Moore-McCormack Lines Inc.,* 325 F. 2d 72, 74-76 (2 Cir. 1963):

> "The trial judge, citing Mitchell v. Trawler Racer Inc., 1960, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, correctly and explicitly stated that the proper standard for seaworthiness is 'one of reasonable fitness'. True it is that the liability for unseaworthiness is absolute and quite independent of fault on the part of the shipowner. But we have here no confusion caused by misapplication of concepts of common law negligence to a claim of unseaworthiness. We are

at a loss to see any basis for setting aside the finding of seaworthiness as clearly erroneous. If the case had been tried to a judge and jury, and the jury had rendered a verdict for defendant on the issue of unseaworthiness, on proper instructions, we would have had no alternative other than to affirm the judgment entered on the verdict. Blier v. United States Lines Company, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836, 82 S. Ct. 32, 7 L. Ed. 2d 37. *Surely we are not to hold that a jury verdict on such a question is entitled to more weight than the finding of a judge who has demonstrated that he was applying the governing legal standard. See Morales v. City of Galveston,* 1962, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 412.

* * *

We are also mindful of the many rulings to the effect that conclusory findings of a trial judge on such subjects as unseaworthiness and negligence in a non-jury trial involve the determination of mixed questions of law and fact freely reviewable on appeal and not subject in the normal sense to the clearly erroneous limitation. (Citing cases). On the other hand, in this same category of cases, numerous decisions, in our own Court and in others as well, review similar findings by applying the clearly erroneous rule. (Citing cases). There is no real inconsistency, we think. It is merely a question of separating the legal from the factual elements involved in the conclusory statements where these involve a mixture of law and fact. Thus, as is implicit in what we have already said in this opinion, if the trial judge, in assaying the proofs, including questions of credibility and the drawing of inferences of fact, can be shown

> to have arrived at his conclusory findings by a misapplication of the law, we must set aside the findings thus made. The reason for this is that findings by a judge based upon a misapplication of the law are in the same category as the verdict of a jury based upon erroneous instructions. Here there is internal evidence, as above explained, that Judge Cooper made no misapplication of the law in arriving at his factual conclusions. On the contrary, both with respect to unseaworthiness and negligence he used the proper standard". (Italics added.)

The law applied herein by the Courts below was in full conformity with the principles of law enunciated by this Court, as is the *Ferrante* decision. Two things which conform to a common third conform to each other, and thus *Ferrante* is not in conflict with the decision in this case. What petitioner fails to appreciate is that there is an area wherein reasonable men, applying the same legal yardstick, may properly disagree as to the conclusion to be arrived at. Such differences and difficulties were foreseen by Judge Learned Hand who stated in *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956) as follows:

> "It would be futile to try to draw any line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy. Nevertheless, it is necessary to separate the two situations, *even though each case must turn on its particular circumstances*". (Italics added.)

Thus, dissimilar results do not mean conflict.

(e) *The Result Here Sought by Petitioner Should Come From Congress as It Would Require a Complete Emasculation of the Longshoremen's and Harbor Workers' Compensation Act.*

In a very real and practical sense, it may be said that accidents to longshoremen occur because of mechanical failure or human error or a combination of both. Human error can be sub-divided into two parts, negligence of ship's personnel and negligence of longshoremen. For personal injuries sustained as the result of mechanical failure, the implied warranty of seaworthiness will operate to give the injured longshoreman a recovery. Where a longshoreman is injured by the negligence of ship's personnel, an action against the shipowner on the theory of negligence will prevail.

Libellant-petitioner is here attempting to obtain a determination that in the third class of cases, where a longshoreman is injured solely because of the negligence of his co-workers, a recovery to the injured longshoreman should be permitted against the shipowner on the theory of a breach of the warranty of seaworthiness. As indicated earlier in this brief, that has not been the law to date.

It is quite apparent that the new law sought herein by petitioner would have several far-reaching effects. One such effect would be that a longshoreman, injured for any reason whatsoever while working aboard ship, would be entitled to recover common-law damages. And, if the basis of the shipowner's liability to the injured longshoreman is solely an act of negligence on the part of the longshoreman, it follows as the night does the day that the shipowner will recover full indemnity from the stevedore employer. Thus, the result here sought by peti-

tioner would completely emasculate the *Longshoremen's* and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U. S. C. §901-950, by destroying the *quid pro quo* inherent in that and any other compensation plan.

There is inherent in the very notion of workmen's compensation the concept that the employer has an absolute obligation to compensate an employee for injuries sustained on the job, and to pay all necessary medical expense, regardless of fault. In exchange for such absolute liability to its employees, the employer's monetary liability is limited to prevailing legislative schedules. The *quid pro quo* is thus the imposition of an absolute liability in exchange for a limitation of amount.

The result, here sought by petitioner, would have the effect of removing the limited amount of an employer's liability and thus destroys the very heart of the *Longshoremen's and Harbor Workers' Compensation Act.* For, if a longshoreman can recover unlimited common-law damages from a shipowner for personal injuries caused solely by the negligence of his co-workers, the shipowner will recover full indemnity for such amount from the employer. The employer would thus have an *unlimited common-law liability* to one of its employees for personal injuries sustained by such employee as the result of his own negligence or that of his fellow employees.

Indeed, where a plaintiff couches his complaint in such terms, it is impossible to envisage any defense that the stevedore would have to a shipowner's claim for indemnity. Accordingly, in an effort to save counsel fees, the stevedore would undoubtedly be required to take over the shipowner's defense in this type of case. The end result would therefore be an action by a longshoreman-employee against the stevedore-employer for unlimited common-law damages.

It is respectfully submitted that such result, which is here sought by petitioner, is so destructive of the entire scheme and underlying principles behind the *Longshoremen's and Harbor Workers' Compensation Act* that the change should come only from Congress.

CONCLUSION

The Petition for a Writ of Certiorari should be denied to which end this brief is

Respectfully submitted,

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(APPENDIX R FOLLOWS)

APPENDIX R

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 144-110

ALFONSO SPINELLI,

Plaintiff.

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Defendant and Third-Party Plaintiff.

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

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McLEAN, *D.J.*

This case started as an action at law and turned into a suit in admiralty, by stipulation of the parties, when doubt arose as to the existence of diversity of citizenship. The suit is by a longshoreman against a shipowner to recover damages for personal injuries allegedly caused by the unseaworthiness of respondent's vessel and by respondent's negligence. The shipowner impleaded libellant's employer, International Terminal Operating Co., Inc. ("ITO"), a stevedoring company. At the trial, I permitted ITO to amend its answer to allege a counterclaim against the shipowner.

On September 17, 1957, libellant was working as a member of a gang of longshoremen loading heavy steel pipe aboard the S.S. Steel Maker which was moored at a dock in Brooklyn. Libellant worked on the stringpiece on the dock. A draft of steel pipe which was being hoisted in a sling from the dock to the vessel fell back to the dock and struck libellant, injuring his foot. The draft fell back because the brake on the ship's winch slipped. An ITO foreman was in charge of making up the drafts of pipe. An ITO employee operated the winch which hoisted them. The critical question of fact is whether the brake slipped because the winch was defective.

I find the facts as to the normal operating procedure in this loading operation and as to the equipment involved to be as follows:

The pipe was loaded into No. 4 hatch of the vessel. There was a burden boom at the forward end of the hatch from which a fall descended to a sling wrapped around one end of the long pipes which made up a draft. A similar burden boom at the after end of the hatch was connected by its fall to a sling wrapped around the other end of the pipes. Each burden boom was operated by a winch, each manned by its own operator. When the signal to hoist was given, the winches were started simultaneously by their respective operators and the draft was lifted from the dock until it was well above the deck of the vessel. At that point two other booms, one at each end of the hatch, each operated by its own winch, pulled the draft inboard until it was suspended over the hatch opening. The burden booms were then lowered to permit the draft to descend into the hatch. In some instances a draft was longer than the hatch opening, which was 32 feet. Hence it could not enter the hatch if it were lowered in a level position. In these instances, it was necessary to tilt the draft forward in order to allow it to enter the hatch. This tilting threw more of the weight on the forward boom and winch.

The winches were operated by electricity. When the gear lever is vertical, the winch is in neutral. The operator pushes the lever forward to lower the boom and backward to raise it. The winch is equipped with brakes consisting of bands around a drum, as in an automobile. The brake bands close around the drum automatically when the gear lever is in the neutral position.

Each boom on the ship has a rated capacity, i.e., the maximum load that it can lift without danger of breaking. Different booms have different capacities, and the same boom may have different capacities depending upon the rig that

is being used. The practice is to set the brakes on the winch to correspond to the capacity of the boom which the winch operates. This is done by the ship's electrician. Thus, if the boom capacity is 3 tons, the brake is set to hold a load of 3 tons. If the boom is subjected to a heavier load, even though the boom does not break, the brake on the winch will not hold the load; it will slip.

Each burden boom at No. 4 hatch was inscribed "S-L 3-5 tons." "S-L" means "Safe Load." The capacity is 3 tons when the boom is used with a single fall, a "single whip" rig, and 5 tons when a "gun tackle" rig is used. The rig in use on September 17, 1957 was a single whip. No one testified specifically that the brakes were set on this particular day to hold a load of 3 tons, but since there is no evidence to the contrary, I find that the normal practice was followed and that they were so set.

193 pipes in all were loaded on the night of September 17. Respondent's records show the exact length and weight of each pipe. They varied in length from a maximum of 35 feet, 2 inches to a minimum of 25 feet, 3 inches, and in weight from a maximum of 1,400 pounds to a minimum of 1,005 pounds. 52 out of the 193 pipes were 32 feet or more in length. 40 were less than 30 feet. There were 13 pipes which weighed between 1,005 and 1,099 pounds each, 41 between 1,100 and 1,199 pounds each, 137 between 1,200 and 1,299 pounds each, and two between 1,300 and 1,400 pounds.

I come now to the events of September 17, 1957. The gang of longshoremen of which libellant was a member began work that night at 7:00 P.M. The day shift had also worked that hatch, and when the night shift arrived, the hatch was already open and the booms rigged. Libellant

was in the part of the gang that worked on the dock. His job was to fasten the slings around each draft of pipes. The ITO foreman in charge of the dock gang was called "Tony the Gump." At the outset the longer and heavier pipes were loaded. Six or seven pipes were included in each draft. Loading operations proceeded without any untoward incident, as far as libellant observed. The forward winch operator, an ITO employee named Ferraiola, testified, however, that on one or two occasions during this period the brake on the winch did not hold properly when the draft was tilted forward to come down into the hatch. He said that when he put his gear lever in neutral, the draft did not stop moving, but continued slowly to come down. No difficulty ensued and Ferraiola did not say anything to anyone about it.

Along about 10:00 P.M. the gang began to load the shorter pipes. At first they put six or seven pipes in each draft. These were hoisted and stowed away without incident. At about 10:45 P.M. the dock foreman, Tony the Gump, told the dock gang to put nine pipes in each draft. Libellant and other longshoremen protested, saying that they feared that to do so would overload the winch. Tony the Gump explained that he was the boss and that he expected his orders to be obeyed. Libellant and the others complied.

Two drafts of nine pipes each were thereafter pulled up without mishap. Then came a third draft. It was hoisted to a height of 3 or 4 feet above the dock, where it paused. This was normal, as it was the practice to hold each draft at this height momentarily to stop any swaying. This particular draft did not continue on its upward way, but immediately after the pause the front end of the draft came back down to the dock. The sling on the front end opened up when it hit the dock and one of the pipes came out and struck libellant on his left foot.

Ferraiola, the winch operator, testified that after this draft had been raised three or four feet, he received the usual signal to stop, that he put the gear lever in neutral, and that the brake did not hold, so that the forward end of the draft fell back down. He testified that after a moment or two, he again received the signal to hoist, he pulled the gear lever backward and the draft came up again. It had only seven pipes in it this time. It was raised over the side and lowered into the hatch without difficulty.

Ferraiola testified further that on a few other occasions between then and midnight, the brake slipped when a draft of seven of the shorter pipes was tilted in order to lower it into the hatch. There were no further accidents, however. Ferraiola testified that during the lunch period at midnight, he told the night mate of the vessel about the slipping. After work resumed at 1:00 A.M., there was no further trouble with slipping of the brake for the rest of the night.

The ship's log contained no entry about the accident or about any complaints concerning the winch brake or any repairs to it. The master of the ship testified that he was not informed of the accident and that as far as he knew, none of the ship's officers was informed. The ship's electrician, whose duty it is to repair winches and their brakes, testified that he was not informed, that no complaint was made to him, and that he made no repairs to the winch that night.

One other fact should be mentioned to complete this summary of the relevant testimony. At some time subsequent to September 17, 1957, Ferraiola gave a signed handwritten statement to an ITO investigator. The exact time cannot be fixed because the statement is not dated. In it Ferraiola said: "The reason for the accident was because it was a defective winch." After this follows a word which

is not very legible but seems to be "because," after which there appears "this electric winch could only be worked at one notch at a time." When shown this statement on the witness stand, Ferraiola denied that he had said that the winch was defective because it could only be worked one notch at a time. Nevertheless, that appears to be what the statement says. Ferraiola admitted that it is normal for a winch to work "one notch at a time" and hence that this does not make the winch defective in any way. Nowhere in the statement does Ferriaola say that the brakes slipped or failed to hold.

On all this evidence, the court is faced with the problem of deciding what it was that caused the front end of this particular draft to fall back and strike libellant. In dealing with that problem, I have made a few arithmetical computations.

The capacity of each boom, and the corresponding holding power of the brakes set to the same figure, was three tons. With a boom at each end of the draft, it would seem that theoretically each boom would carry only half the load and hence that between them they could lift six tons. This is apparently not true as a practical matter, however, because when the load is tilted forward, for example, more than half the load falls on the forward boom and winch. No very satisfactory evidence was offered as to how to measure this difference. Ferraiola said that, on the assumption that the two booms between them had a rated capacity of ten tons, it would actually be unsafe to lift more than seven. If we apply this formula to booms having a total capacity of six tons instead of ten, it would be unsafe to lift more than 7/10ths of six tons, *i.e.*, 8,400 pounds, or 4.2 tons.

We do not know exactly how much each draft weighed. We do know that the great majority of the pipes weighed

between 1,200 and 1,300 pounds each. If we take 1,250 pounds as a fair average weight of the longer pipes, a draft of seven of those pipes would weigh 8,750 pounds or 4.37 tons.

We know that there were 40 pipes which were less than 30 feet long and which must be the ones referred to as the shorter pipes. This number corresponds roughly to the 54 pipes which weighed between 1,005 and 1,199 pounds each. Of the 54, 41 weighed over 1,100 pounds. A weight of 1,100 pounds would seem to be a fair average for this group. On this basis, nine of these pipes would weigh 9,900 pounds or 4.9 tons. Seven of them would weigh 7,700 pounds, or 3.8 tons.

Admittedly these figures are not precise enough to satisfy a physicist, but they are the best estimates that I can make from the evidence. They would point to these conclusions:

1. A draft of seven of the longer pipes weighed slightly more than the lifting capacity of the booms and the holding power of the winch brakes as they were set, *i.e.*, 4.37 tons, as contrasted with a capacity of 4.2 tons.

2. A draft of seven of the shorter pipes weighed distinctly less than capacity, *i.e.*, 3.8 tons, as contrasted with 4.2 tons.

3. A draft of nine of the shorter pipes weighed considerably more than capacity, *i.e.*, 4.9 tons, as contrasted with 4.2 tons.

These figures would explain why the drafts of seven of the longer pipes were loaded safely, albeit with slight slipping of the brakes in some instances, if Ferraiola's testimony is to be credited. They would also explain why drafts of seven of the shorter pipes were loaded without incident

and why the draft of nine of the shorter pipes could not be held by the winch brakes. The weight of the draft of seven longer pipes, although somewhat above the capacity of the equipment upon my figures, is within a reasonable degree of tolerance, bearing in mind that the figures cannot be exact. A draft of seven of the shorter pipes is clearly within the capacity of the equipment and a draft of nine of the shorter pipes is clearly beyond it.

How does Ferraiola's testimony jibe with these conclusions? He testified that the brakes slipped once or twice, although not seriously enough to cause him to mention it to anyone, before the accident, when the drafts of seven longer pipes were being lowered into the hold. This testimony may well be true and still be consistent with the conclusion to which the figures point, for it is obvious that the weight of these drafts was very close to the limit of capacity of the equipment. Ferraiola also testified that after the accident the brakes slipped, although again not seriously, between the time of the accident and midnight, when drafts of only seven shorter pipes were being loaded. I find it difficult to reconcile this testimony with the figures. Not only because of that inconsistency, but for another reason as well, I am disposed to reject this part, at least, of Ferraiola's testimony as untrue. The other reason is this:

Ferraiola admitted that the winch worked properly after the midnight lunch hour on drafts of seven shorter pipes. He implied, although he never said so expressly, that the winch was repaired during the lunch hour. This is the necessary result of his testimony, if the testimony is true, for otherwise there would be no explanation of why the brakes slipped on a seven-pipe draft before midnight but not afterward.

But the log book reflects no complaint and no repairs, as it should do if any were made. The ship's electrician said definitely that he had made none. I accept, as more credible under all the circumstances, the evidence of the log book and of the electrician, whose demeanor on the stand impressed me more favorably than Ferraiola's. I believe, therefore, that no repairs were made during the midnight rest period. Consequently, since concededly the brake did not slip on a draft of seven shorter pipes after midnight, there is no reason to believe that it did so before midnight.

This conclusion is fortified by the fact that Ferraiola's testimony of continued slipping after the accident appears to be an afterthought, in view of the fact that in his statement to the ITO investigator, he made no mention of any slipping of the brakes, but instead attempted to support his claim that the winch was defective by a reason which concededly makes no sense.

It is true that in giving his opinion that the safe limit of load for two single whip booms is only 70 per cent of their theoretical total capacity, Ferraiola stressed the fact that a disproportionately large share of the total weight falls upon one boom when the load is tilted. There is no evidence here as to whether or not the draft was tilted at the moment that it fell. This gives rise to doubts that are aggravating because seemingly they could have been cleared up by additional evidence. Nevertheless, I must deal with the evidence that was introduced, incomplete though it may be.

Libellant has the burden of proving by a preponderance of the credible evidence that the appliance, *i.e.*, the winch and its brake, was not reasonably fit for its intended use. *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223 (2d Cir. 1963). In my opinion libellant has failed to meet that burden here. The most probable explanation of this accident is that the

slipping was caused by overloading a winch which was in a sound condition, reasonably fit for its intended use, and which would not have failed if it had been properly used. That is the explanation which I adopt. Accordingly, upon all the evidence, I find the facts to be as follows:

1. The brake did not slip after the accident when the loads were reduced to 7 shorter pipes.

2. Ferraiola did not report any slipping to the night mate.

3. The brake on the winch was not repaired at any time on the night of September 17-18, 1957.

4. The winch and the brake were not defective, but were in good condition and were reasonably adequate appliances when used in a proper manner as they were intended to be used.

5. The brake slipped not because of any defect in the brake or winch but because the draft in question was too heavy for the brake as it was set.

6. The winch and brake were not used in a proper manner as they were intended to be used.

7. The loading of the pipes and the operation of the winch were under the sole control of ITO.

8. The winch was overloaded because the ITO foreman insisted that nine pipes be placed in the draft.

9. In so doing, despite the protest of plaintiff and other longshoremen, the ITO foreman failed to use the care which

a reasonably prudent man would exercise under the circumstances.

10. The employees of the shipowner had no notice, actual or constructive, of the improper use of the winch by the longshoremen or of the accident.

11. The overloading of the winch was the sole cause of the slipping of the brake and the sole cause of the accident and the injury to plaintiff.

Upon these findings, I conclude as follows:

1. The shipowner was not negligent.

2. The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), relied upon by libellant, so holds. In that case, the negligent operation of the stevedore "did no more than bring into play the unseaworthy condition of the vessel" which had previously existed. Here there was no such previously existing unseaworthy condition.

3. ITO was negligent.

4. The negligence of ITO was the sole cause of the accident and of plaintiff's injury.

Pursuant to Rule 52(a), this opinion constitutes the court's findings of fact and conclusions of law.

The clerk is directed to enter judgment in favor of respondent Isthmian Steamship Company dismissing the libel. In view of this dismissal, the claim of Isthmian Steamship Company against International Terminal Operating Co., Inc. and International Terminal Operating Co., Inc.'s counterclaim against Isthmian Steamship Company become academic and they are accordingly dismissed.

So ordered.

Dated: New York, N. Y.
May 14, 1963

EDWARD C. McLEAN
U. S. D. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 991.

ALFONSO SPINELLI,

Libellant-Petitioner,

against

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

BRIEF OF RESPONDENT, ISTHMIAN STEAMSHIP COMPANY, a corporation, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of Case	2
Reasons for Denying Writ	4
Conclusion	15

TABLE OF CASES.

	PAGE
Ballwanz v. *Isthmian Lines, Inc.*, 319 F. 2d 457 (4 Cir. 1963), cert. den. April 6, 1964	8, 15
Billeci v. *United States*, 298 F. 2d 703 (9 Cir. 1962)	15
Blier v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. den. 368 U. S. 836 (1961)	6, 15
Capitol Transportation Co. v. *Cambria Steel Co.*, 249 U. S. 334 (1919)	8
Crumady v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959)	4, 5, 6, 15
Donovan v. *Esso Shipping Co.*, 259 F. 2d 65 (3 Cir. 1958), cert. den. 359 U. S. 907	15
Ezekiel v. *Volusia Steamship Co.*, 297 F. 2d 215 (2 Cir. 1961)	5, 6
Ferrante v. *Swedish American Lines*, decided April 16, 1964, F. 2d	8, 10, 11
Gindville v. *American-Hawaiian Steamship Company*, 224 F. 2d 746 (3 Cir. 1955)	8
Grillea v. *United States*, 232 F. 2d 919 (2 Cir. 1956)	6
Grzybowski v. *Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960)	15
Knox v. *United States Lines*, 294 F. 2d 354 (3 Cir. 1961)	10, 11, 12, 15
Knox v. *United States Lines Company*, 201 F. Supp. 131 (E. D. Pa. 1962)	12
Knox v. *United States Lines Company*, 320 F. 2d 247 (3 Cir. 1963)	15
McAllister v. *United States*, 348 U. S. 19 (1954)	13
Mitchell v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960)	4, 5, 15
Morales v. *City of Galveston et al.*, 370 U. S. 165 (162)	6
Mosley v. *Cia. Mar. Adra., S. A.*, 314 F. 2d 223 (2 Cir. 1963), cert. den. 375 U. S. 829 (1963)	6
Oddenes v. *Universe Tankships, Inc.*, 188 F. Supp. 117 (S.D.N.Y. 1960)	8

PAGE

Puddu v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (2 Cir. 1962), cert. den. 371 U. S. 840 (1962) 9, 14, 15, 16

Provenza v. *American Export Lines, Inc.*, 324 F. 2d 660 (4 Cir. 1963) 15

Rich v. *Ellerman & Bucknall S. S. Co.*, 278 F. 2d 704 (2 Cir. 1960) 7

Royal Mail Lines, Ltd. v. *Peck*, 269 F. 2d 857 (9 Cir. 1959) 14, 15

Scott v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964) 8, 9, 10, 12, 15

Seitz v. *M. V. Captantonis*, 203 F. Supp. 723 (D.C.D. Ore. 1962) 15

The Benjamin Noble, 244 Fed. 95 (6 Cir. 1917) 7, 8

Titus v. *Santorini*, 258 F. 2d 352 (9 Cir. 1958) 5, 6, 15

Vega v. *The Malula*, 291 F. 2d 415 (5 Cir. 1961) 7

Williams v. *The SS Richard de Larrinaga*, 287 F. 2d 732 (4 Cir. 1961) 15

STATUTES.

28 U. S. C. Section 1254(1) 2

28 U. S. C. Section 2101(c) 2

46 U. S. C. A., Secs. 85-85(g) 7

46 U. S. C. A., Secs. 88-88(i) 7

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BRIEF OF RESPONDENT, ISTHMIAN STEAMSHIP COMPANY, a corporation, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of United States District Judge Edward C. McLean, dismissing the libel, is not reported. It is printed in Appellant's Appendix in the Court below.

The opinion of the Court of Appeals for the Second Circuit, is reported in 326 F. 2d 870, and is printed in Petitioner's Appendix A.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit, affirming the decree of the District Court dismissing

the libel, was entered on January 13, 1964. It is set forth in Petitioner's Appendix B.

It is not disputed that the jurisdiction of this Court is invoked by virtue of 28 U. S. Code, Sections 1254 (1) and 2101 (c).

Question Presented.

Whether or not an accident to a longshoreman caused by the negligent use of vessel's equipment which is reasonably fit for its intended purpose renders the vessel unseaworthy.

Statement of Case.

Petitioner, a longshoreman employed by respondent International Terminal Operating Co., Inc., was injured while loading steel pipes aboard the SS *Steel Maker* at the Erie Basin Terminal, Brooklyn, New York, on September 17, 1957. On that day, petitioner and his co-employees were loading large loose steel pipes aboard said vessel. Petitioner was a dock man who assisted in making up drafts of pipe. The pipes weighed from a minimum of 1005 pounds to a maximum of 1400 pounds each. A draft consisted of six or seven pipes. Petitioner and his fellow longshoremen were working for three to three and one-half hours and experienced no difficulty in raising the drafts of pipe being taken aboard the vessel. Shortly before 11:30 P.M. one of the foremen for respondent International Terminal Operating Co., Inc., ordered petitioner and the other longshoremen, over their protests that the winch could not hold the extra pieces of pipe, to put two extra pipes on the draft. Two drafts of nine pieces of pipe were taken aboard the vessel without incident. On the third draft containing extra pipes, the winch took the load up

about three or four feet when it suddenly came down and petitioner was injured when one pipe rolled across his left foot.

At the completion of the trial the Judge made the following specific findings of fact and conclusions of law:

"I find the facts to be as follows:

1. The brake did not slip after the accident when the loads were reduced to 7 shorter pipes.

2. Ferraiola did not report any slipping to the night mate.

3. The brake on the winch was not repaired at any time on the night of September 17-18, 1957.

4. The winch and the brake were not defective, but were in good condition and were reasonably adequate appliances when used in a proper manner as they were intended to be used.

5. The brake slipped not because of any defect in the brake or winch but because the draft in question was too heavy for the brake as it was set.

6. The winch and brake were not used in a proper manner as they were intended to be used.

7. The loading of the pipes and the operation of the winch were under the sole control of ITO.

8. The winch was overloaded because the ITO foreman insisted that nine pipes be placed in the draft.

9. In so doing, despite the protest of plaintiff and other longshoremen, the ITO foreman failed to use the care which a reasonably prudent man would exercise under the circumstances.

10. The employees of the shipowner had no notice, actual or constructive, of the improper use of the winch by the longshoremen or of the accident.

11. The overloading of the winch was the sole cause of the slipping of the brake and the sole cause of the accident and the injury to plaintiff.

Upon these findings, I conclude as follows:

1. The shipowner was not negligent.

2. The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1959), relied upon by libellant, so holds. In that case, the negligent operation of the stevedore "did no more than bring into play the unseaworthy condition of the vessel" which had previously existed. Here there was no such previously existing unseaworthy condition.

3. ITO was negligent.

4. The negligence of ITO was the sole cause of the accident and of plaintiff's injury."

Reasons for Denying Writ.

At the outset of the argument setting forth the reasons why the Writ should be granted, it is contended that the decision of the Court of Appeals for the Second Circuit concerning the instant case is in error and not in accord with the decisions of this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959) and *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

When analyzed in the light of their own particular facts, neither *Crumady* nor *Mitchell*, is in conflict with the decision reached by the District Court and the affirmance by

the Court of Appeals in the case at hand. In *Crumady*, the Supreme Court held that a vessel was liable where the stevedoring company overloaded a boom, causing a *pre-existing unseaworthy condition to come into play.* In other words, the instrumentality in *Crumady* was not inherently defective but had previously been adjusted in a way that made it unsafe and dangerous for the work at hand and, therefore, unseaworthy. In *Spinelli* (the case at bar), no such underlying unseaworthy condition existed. In fact, there was an express finding by the District Court that the winch was in sound condition and reasonably fit when used in a proper manner. Hence, the finding of the District Court below comes squarely within the teachings of *Mitchell* v. *Trawler Racer, Inc., supra,* where Mr. Justice Stewart, delivering the majority opinion of this Court, said, at page 550:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin* v. *Lykes Bros. SS Co.*, 348 U. S. 336."

The language by Mr. Justice Stewart is unmistakable: "The standard is not perfection, but reasonable fitness . . .". If the mere happening of an injury was sufficient to raise the concept of unseaworthiness, the standard would be not reasonable fitness but that of perfection and the owner would be obligated to furnish an accident-free vessel. See also *Titus* v. *Santorini*, 258 F. 2d 352 (9 Cir. 1958); *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 215 (2

Cir. 1961); *Mosley* v. *Cia. Mar. Adra., S. A.*, 314 F. 2d 223 (2 Cir. 1963), cert. den. 375 U. S. 829 (1963).

The concept of unseaworthiness is a relative one. As petitioner alleges, "It is not the time that the condition exists which is the significant factor; it is the distinct status of the condition".

As Judge Learned Hand said in *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956), at page 922:

> "* * * each case must turn on its particular circumstances . . .".

The rule for determining unseaworthiness does not change by reason of a temporary condition as opposed to a permanent one. All concepts of unseaworthiness being divorced from those of negligence, the fact remains that a vessel and its equipment is seaworthy provided it was otherwise reasonably safe and suitable and fit for the intended use. *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. den. 368 U. S. 836 (1961).

As observed by Mr. Justice Stewart in *Morales* v. *City of Galveston et al.*, 370 U. S. 165 (1962), an unseaworthy condition *might* arise from any number of individualized circumstances. However, such observation is not a direction by the Court that because a stevedore or its employees used equipment in a manner for which it was never intended to be used, that a finding of unseaworthiness *must* be made.

There is no gainsaying the fact that a stevedore's breach may create an unseaworthy condition or may activate a ship's pre-existing unseaworthy condition. *Crumady* v. *The Joachim Hendrick Fisser, supra.* However, an examination of those cases in support of the petition shows that where there has been a holding of unseaworthiness, such unseaworthiness was found to exist as a matter of fact, or, as the various Courts of Appeals have declared, the factual

issue should have been submitted to a jury for determination.

In *Rich* v. *Ellerman & Bucknall S. S. Co.*, 278 F. 2d 704 (2 Cir. 1960), the charge to the jury was such as to preclude the jury from finding that the stowage of cargo was such as to create an unseaworthy condition as a matter of *fact*. It appears that in *Rich* a dangerous working platform consisting of automobile chasses had been left in a dangerous condition by the stevedores for a substantial period of time. Based on the facts as they existed in *Rich* a jury could have concluded that the vessel was unseaworthy.

Vega v. *The Malula*, 291 F. 2d 415 (5 Cir. 1961) is no support for the petition. In *Vega* a sheave fell out of a cargo block when the pin unaccountably slipped out of the sheave. Unlike the case at bar, in *Vega* at the time of the accident *the block was being used for a normally expected purpose* and there was absolutely no question involved in that case concerning improper use of the block at the time of the accident. Hence, the Court was justified in labelling this as a "classic case of patent unseaworthiness".

The Benjamin Noble, 244 Fed. 95 (6 Cir. 1917), is also without pertinency. In that case, the entire vessel was overloaded and thus caused to founder and sink. It is well known that in early days shipowners took advantage in loading their vessels beyond capacity to function in normal sea conditions. Hence, many a vessel was lost because of this attempt to carry more than the vessel could reasonably hold. Such former practice led to the passage of the Load-line Statute, 46 U.S.C.A., Secs. 85-85(g); for coastwise vessels, 46 U.S.C.A., Secs. 88-88(i). Can there be any doubt that a foundering vessel is unseaworthy?

It is abundantly clear that where the Court spoke of overloading a vessel thus rendering her unseaworthy, as

referred to in *Benjamin Noble, supra,* and affirmed in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334 (1919), the Courts were referring to entire vessels which were overloaded and thus rendered unseaworthy, not a particular portion of a vessel which was reasonably fit for its intended use but was otherwise misused by the stevedore. Nor does respondent, Isthmian, deny that an unsecured wooden spreader which fell and struck the plaintiff was in unseaworthy condition, *Ballwanz* v. *Isthmian Lines, Inc.*, 319 F. 2d 457 (4 Cir. 1963), cert. den. April 6, 1964; or that a longshoreman may recover when he is injured as the result of unloading improperly stowed cargo, *Gindville* v. *American-Hawaiian Steamship Company*, 224 F. 2d 746 (3 Cir. 1955); or that an improperly rigged hawser which jumps out of a chock when it is not supposed to may constitute unseaworthiness, *Oddenes* v. *Universe Tankships, Inc.*, 188 F. Supp. 117 (S.D.N.Y. 1960). However, as indicated previously, where there has been a finding of unseaworthiness it has been because of an underlying defective condition in the instrumentality used. It is submitted there is no such finding in the case at bar. In fact, the case at hand does not deal with improper stowage; it is concerned solely with the misuse of good equipment by the stevedore.

Petitioner contends that the decision of the Court of Appeals for the Second Circuit in the instant matter is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964), and also with the decision of the Court of Appeals for the Third Circuit in *Ferrante* v. *Swedish American Lines*, decided April 16, 1964, F. 2d . This is clearly not so.

The petitioner states that in the *Scott* case the Fourth Circuit Court held that an unseaworthy condition may be

created by "the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation": It is obvious from reading *Scott* that the Fourth Circuit clearly held that the stevedore's method of operation may create a *factual issue* as to whether an unseaworthy condition was created for which the shipowner is liable to the injured longshoreman. However, because of the Trial Court's misleading special interrogatory and its erroneous instructions to the jury in *Scott*, the factual issue of unseaworthiness was never determined by it. The Fourth Circuit said, (pp. 125, 126):

> "In this Circuit it is no longer open to question that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation may present a *factual issue* as to whether an unseaworthy condition is created for which the shipowner may be held liable for injury to a longshoreman resulting from such condition." (Emphasis supplied.)

Such holding is in complete accordance with *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (2 Cir. 1962), cert. den. 371 U. S. 840 (1962), which petitioner admittedly recognizes was a case which turned on the finding that the question of unseaworthiness was a factual question (Petition, page 13).

In the instant case there was no such error as was committed in the *Scott* case because the Judge below was not only the trier of the law but also the trier of the facts. Judge McLean found *as a matter of fact*, upon conflicting evidence, that the winch ". . . was in sound condition, reasonably fit for its intended use and . . . would not have failed if it had been properly used. This is the explanation I adopt. . . ".

Can it be suggested that if the case at bar had been tried to a jury rather than to a judge and the jury found that the vessel was seaworthy, such a jury finding would be any the less binding than that of the District Judge who heard all the witnesses and saw all the evidence presented?

Petitioner also alleges a conflict exists with the Third Circuit by reason of the case of *Ferrante* v. *Swedish American Lines, supra.* The purported inconsistency which the *Ferrante* case interjects into this issue is, not with other Circuits, but is rather with other cases in the Third Circuit itself, and is based primarily upon misinterpretation of the case of *Knox* v. *United States Lines,* 294 F. 2d 354 (3 Cir. 1961), and also the case of *Scott* v. *Isbrandtsen Co., Inc., supra.*

In the *Ferrante* case, the District Court, sitting in Admiralty, found that the negligence of the stevedore in using an allegedly faulty method to discharge a ship's cargo did not make the ship unseaworthy or the shipowner negligent. The libelants appealed, contending that the District Court's fact findings were "clearly erroneous" because they were the end result of the failure to apply proper legal standards. In its opinion of April 16, 1964, the Third Circuit cites the case of *Knox* v. *United States Lines Company, supra,* stating that in the *Knox* case there had been a jury finding that the stowage was seaworthy prior to the commencement of the stevedore's breaking-down operation. It then compared such a jury finding to the situation existing in *Ferrante* where it was undisputed that the ship's equipment—manila rope—was fit for its intended use. The Court concluded therefrom:

> "... Unless a valid distinction can be drawn between a stevedore's *unsafe* breaking-down of a seaworthy stowage and its negligent (unsafe) use

> of a ship's equipment, a logical projection of our holding in Knox would seem to indicate our subscription to the view that a stevedore's negligent or unsafe use of a ship's seaworthy equipment makes the ship unseaworthy." (Emphasis supplied.)

This conclusion is not only an incorrect statement of the Third Circuit's holding in the *Knox* case, but is, in addition, a conclusion based on the improper assumption that the stevedore's break-down in *Knox* was unsafe. This was the very issue, the unanswered question of fact, which prompted the reversal by the Third Circuit of the Trial Court in the *Knox* case. Indeed, in the *Knox* case itself, the Court discusses at length the conflicting evidence presented at the trial, including the opinions of expert stevedores, as to whether or not the breaking-down was dangerous or unsafe. Then, the Court in *Knox* concluded as follows (p. 358):

> "Under the Mitchell doctrine the evidence here created a jury question as to whether the seven or eight foot 'V' dug out in the stowage by the longshoremen constituted an unseaworthy condition."

It is perfectly obvious that at no time did the Third Circuit in *Knox* hold that the stevedore's breaking-down of the seaworthy stowage was unsafe. It clearly held that this was a factual question for a jury to determine. It follows that the aforementioned quoted conclusion from the *Ferrante* decision is erroneous and no such projection of *Knox* is indicated.

Moreover, the Third Circuit also makes the following fallacious notation in the *Ferrante* decision:

> "It compels notation that the Court of Appeals for the Fourth Circuit in Scott *v.* Isbrandtsen Company, Inc., 327 F. 2d 113 (1964) has construed *Knox*

> as holding that a longshoreman's negligent method of discharging cargo makes the ship unseaworthy . . ."

It is obvious that *Scott* held no such thing. Indeed, the very quotation from *Scott*, which is quoted in the *Ferrante* decision, holds that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation may present *a factual issue* as to whether an unseaworthy condition is created.

In *Scott supra*, the Fourth Circuit specifically stated its surprise (p. 126) that the defendant therein had cited *Knox* in support of its contention that no factual issue of unseaworthiness arises from a longshoreman's alleged negligent method of discharging the ship's cargo. The Court in *Scott* proceeded to discuss the *Knox* case, 294 F. 2d 354, as well as the re-trial of that case, 201 F. Supp. 131 (E. D. Pa. 1962), and also the second appeal to the Third Circuit, 320 F. 2d 247 (3 Cir. 1963). On the basis of its discussion of all of these cases, the Fourth Circuit in *Scott* concluded as follows (at p. 127):

> "Although the issues in these *Knox* cases were ultimately resolved by a factual determination as to proximate cause, the conclusion is inescapable that the Third Circuit recognized that there existed a question of fact, to be determined by the trier of fact, i.e., whether the longshoremen's negligent method of discharging the cargo, though unknown to the shipowner, created an unseaworthy condition."

It is interesting to note that upon the re-trial of the *Knox* case (201 F. Supp. 131), a jury trial was waived by stipulation of counsel in order to permit the District Court to decide the issues based on the record of the prior trial and further argument. The issues were limited to whether or not the stevedore's break-down of the cargo constituted

an unseaworthy condition, and to what extent, if any, the plaintiff was contributorily negligent. The District Court made thirteen specific findings of fact, one of which (#13) stated as follows:

> "At all times herein referred to the stowage, appurtenances and the ship itself was *reasonably safe for the uses and purposes for which it was intended* and for any work required to be done upon it, including discharge of cargo" (emphasis supplied).

From these findings of fact the District Court concluded (p. 134):

> "If we could conclude from this evidence that the creation of the 'V' made this ship unseaworthy, temporarily or permanently, then plaintiff should recover. But, in our opinion, the plaintiff has not carried the burden of proving the existence of such a condition under all the testimony submitted at the original trial.
>
> "Plaintiff seems to argue that when negligence exists and an accident occurs on board ship *a fortiori* unseaworthiness must be present: *This we cannot accept as a rule of law nor as a finding of fact under the proofs in this case*" (emphasis supplied).

Knox again appealed to the Court of Appeals for the Third Circuit (320 F. 2d 247), on the ground that the Trial Court's findings of fact were "clearly erroneous" under the rule of *McAllister* v. *United States*, 348 U. S. 19 (1954). After considering, for the second time, the conflicting evidence relating to unseaworthiness, the Third Circuit held as follows (p. 250):

> "The factual setting of the accident in this case is not that pertaining in the Mitchell case, *supra*. We are unable to find features of this case which would distinguish it from Donovan *v.* Esso Shipping

Co., 259 F. 2d 65 (3rd Cir. 1958), cert. den. 359 U. S. 907, 79 S. Ct. 583, 3 L. Ed. 2d 572 (1959), and Puddu *v.* Royal Netherlands Steamship Company, 303 F. 2d 752 (2nd Cir. 1962), cert. den. 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962)."

Thus, any confusion which may have resulted from the first *Knox* case in the Third Circuit (294 F. 2d 354) is now clearly resolved and any alleged conflict with the Second Circuit specifically rejected.

Petitioner argues that in *Puddu* v. *Royal Netherlands Steamship Company, supra* the finding of the question of unseaworthiness was a factual issue while in the instant case the issue was a legal issue and allegedly was so regarded by the Trial Judge. It would appear from a comparison of the present case with *Puddu* that the issues are remarkably similar. In each case there was nothing wrong with the vessel's equipment. It was merely misused by the stevedore. As a matter of fact, the case at hand is even stronger than *Puddu*. In *Puddu*, equipment broke and had to be replaced because of the negligence of the longshoremen. In the case at bar no repairs were necessitated after the accident to petitioner; just as soon as the stevedores reduced the number of pieces of pipe in the draft the winch responded in the manner intended.

Petitioner further denies that we are here dealing with a situation of operational negligence such as the Court found in *Puddu*. It is submitted that it would be difficult to find a more classic example of that doctrine. The evidence submitted at the trial amply supported the findings of fact which the trial court made. It is well established that the shipowner's warranty of seaworthiness does not encompass the negligence by a stevedore or its employees in the use of seaworthy appliances. *Titus* v. *The Santorini*, 258 F 2d 352 (9 Cir. 1958); *Royal Mail Lines, Ltd.* v. *Peck*, 269 F.

2d 857 (9 Cir. 1959); *Billeci* v. *United States*, 298 F. 2d 703 (9 Cir. 1962); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65 (3 Cir. 1958), cert den. 359 U. S. 907; *Williams* v. *The SS Richard de Larrinaga*, 287 F. 2d 732 (4 Cir. 1961); *Puddu* v. *Royal Netherlands Steamship Company, supra*; *Seitz* v. *M. V. Captantonis*, 203 F. Supp. 723 (D.C.D. Ore. 1962).

Moreover, without a conviction that the accident happened because of a definite condition for which the shipowner was to blame, the trial court had no duty to find for the injured longshoreman. *Titus* v. *The Santorini, supra.* Whether a stevedore's negligent method of discharging the cargo created an unseaworthy condition is a question of fact to be determined by the trier of the facts. *Puddu* v. *Royal Netherlands Steamship Company, supra*; *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. den. 368 U. S. 836 (1961); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65 (3 Cir. 1958), cert. den. 359 U. S. 907; *Knox* v. *United States Lines Company*, 294 F. 2d 354 (3 Cir. 1961); *Knox* v. *United States Lines Company*, 320 F. 2d 247 (3 Cir. 1963); *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964); *Ballwanz* v. *Isthmian Lines, Inc.*, 319 F. 2d 457 (4 Cir. 1963), cert. den. April 6, 1964, U. S. ; *Provenza* v. *American Export Lines, Inc.*, 324 F. 2d 660 (4 Cir. 1963); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960).

Conclusion.

The decision of the Court of Appeals for the Second Circuit in the instant case is entirely in accord with the decision of this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959), and *Mitchell* v. *The Trawler Racer, Inc.*, 362 U. S. 539 (1960). The facts of the instant case lie squarely within, and are governed by, the

doctrine set forth in the case of *Puddu* v. *Royal Netherlands Steamship Co., supra.*

There exists no conflict among the United States Courts of Appeal for the Second, Third and Fourth Circuits on the issue presented herein.

The petition should be denied in all respects.

Respectfully submitted,

ROBERT P. HART,
Counsel for Respondent Isthmian Steamship Company.

RALPH C. KREIMER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 991

ALFONSO SPINELLI,
Libellant-Petitioner,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,
Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Respondent.

REPLY BY PETITIONER TO BRIEFS OF RESPONDENTS

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TABLE OF CONTENTS

	PAGE
REASONS FOR ALLOWANCE OF THE WRIT	1

Cases Cited

Ferrante v. Volusia Steamship Co., —— F. 2d (3rd Cir. 1964), not officially reported	2
Scott v. Isbrandtsen Co., 327 F. 2d 113 (4th Cir. 1964)	2

IN THE

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Respondent.

REPLY BY PETITIONER TO BRIEFS OF RESPONDENTS

Reasons for Allowance of the Writ

The trial court, in making its findings of fact, based its decision on erroneous legal concepts. The Court stated (25a):

"* * * I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. * * *"

This interpretation should be compared with the conclusion of Judge KALODNER in very recent case of *Ferrante* v. *Volusia Steamship Co.*, —— F. 2d (3 Cir. 1964) (not officially reported) where he concluded:

"* * * Whether the operation is regarded as 'stowage' of the piles of boards as a part of the discharge process, or the construction of a 'draft', or as the mere use of the ship's equipment—the manila ropes—the fact remains that the stevedore 'failed to perform safely, a basis for liability including negligent and non-negligent conduct alike', and that made the ship unseaworthy."

The *Ferrante* case, which was decided after the petition in this case was printed and filed, gives added support to the contentions in the petition. There is a conflict of the opinions in the Second Circuit on the one hand and in the Third and Fourth Circuits on the other hand. *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113, 127 (4 Cir. 1964). The *Ferrante* case is very similar to the present case because a finding of fact based on an erroneous interpretation of law was reversed. The court, in *Ferrante*, did not regard the factual findings of the trial judge untouchable where it was apparent that he misinterpreted the law. Similarly, in this case, it is apparent that the trial court misinterpreted the decisions discussed in our petition and supporting brief. The case involves a very important aspect of maritime law. There is diversity of opinion among the Courts of Appeal in at least three Circuits. The decision

of the Court below is not in accord with the decisions of this Court. For these reasons we again request that the petition be granted.

Respectfully submitted,

NATHAN BAKER,
Counsel for Libellant-Petitioner.

BAKER, GARBER & CHAZEN,
Proctors for Libellant-Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 991

ALFONSO SPINELLI,
Libellant-Petitioner,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,
Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT	2
CONCLUSION	4
Certificate of Counsel	4
APPENDIX:	
A—Opinion of the Court	5
B—Opinion of the Court	8

Cases Cited

Ferrante v. Volusia Steamship Co., —— F. 2d —— (3rd Cir. 1964)	2
Morales v. City of Galveston, 370 U. S. 165 (1962)	3
Scott v. Isbrandtsen Co., 327 F. 2d 113 (4th Cir. 1964)	2
Thompson v. Calmar Steamship Corporation, Docket No. 14410, petition for rehearing denied	2, 3

Rule Cited

Rule 58 of the Supreme Court	4

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 991

ALFONSO SPINELLI,

Libellant-Petitioner,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of May 18, 1964, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed on or about April 3, 1964.

Reasons for Granting Rehearing and Issuing the Writ

1. The order of the court in the above case was dated May 18, 1964. On May 20, 1964 the United States Court of Appeals for the Third Circuit in a *per curiam* opinion sitting *en banc* in the case of *Thompson* v. *Calmar Steamship Corporation*, docket No. 14410, denied a petition for a rehearing in that case. The original opinion was filed by the court on April 15, 1964. Your petitioner, however, had no knowledge of this important decision until after the decision of this court. The opinions of the United States Court of Appeals for the Third Circuit are appended to this petition for a rehearing.

In the present case the trial court found that the draft on the winch was deliberately overloaded by the longshoremen (24a) and that "the brake slipped not because of any defect in the brake or winch but because the draft in question was too heavy for the brake as it was set" (24a). The court found that libellant's employer, I.T.O., was negligent in using this method of unloading (25a). The court did not find the vessel unseaworthy stating, "I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended." (25a). The Court of Appeals affirmed *per curiam* stating that "the accident happened because the stevedore boss changed from drafts of 6 pipes to a draft of 9 pipes, although warned that such a load was too heavy for the winch." (Pet. 19). The courts below found that the winches, as loaded, were defective and unsafe but attributed the fault entirely to the libellant's employer. We have already called the court's attention to the decisions of *Ferrante* v. *Volusia Steamship Co.*, —— F. 2d —— (3 Cir. 1964) and *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113, 127 (4 Cir. 1964) which are in conflict with the interpretation of the courts below in this case.

The courts below incorrectly decided the legal aspects of this case by limiting the concept of unseaworthiness to the condition of individual parts of the vessel as inanimate things and by excluding conditions which are created by the improper use of parts of the vessel.

In the *Thompson* case, opinion appended hereto, the Court reviewed the concept of unseaworthiness. Citing the decision of *Morales* v. *City of Galveston*, 370 U. S. 165 (1962) the court concluded that unseaworthiness may result from the method of loading cargo as well as from other causes even though there is nothing wrong with the equipment *per se*. The court found that in the *Thompson* case there was a highly questionable loading procedure. The trial court had specifically found that there was no insulation from responsibility for unseaworthiness merely because the vessel's equipment was not defective if used in some manner other than the improper manner employed by the longshoremen. The court upheld the verdict in the case on the ground that the "method used to load the ship's cargo created an undue risk to those called upon to load it, making the vessel unseaworthy, and that the unseaworthiness was the cause of the injury". This decision is squarely opposed to the holding of the courts below in this case. It was specifically determined that the method prescribed by the libellant's employer in this case in the loading process was dangerous and unsafe and was the cause of libellant's injury.

The issue concerning the creation of an unseaworthy condition by the use of otherwise seaworthy equipment in a negligent manner in loading and unloading is an important issue which has been and will continue to be a basis of many claims in maritime law. It is important that the legal concepts relating to this type of case be settled by this court. It is likely that petitions will be filed in the recent cases which we have cited and it is respectfully suggested

that this court should grant the writ of certiorari in this case so that the matter will be fully considered and the law clarified for the guidance of all courts called upon to interpret and apply maritime law.

CONCLUSION

For reasons set forth above and in the petition for writ of certiorari and in the reply of the petitioner to the briefs of the respondents, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

NATHAN BAKER,
Counsel for Libellant-Petitioner.

BAKER, GARBER & CHAZEN,
Proctors for Libellant-Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this court.

NATHAN BAKER,
Counsel for Libellant-Petitioner.

BAKER, GARBER & CHAZEN,
Proctors for Libellant-Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,410

JAMES THOMPSON

v.

CALMAR STEAMSHIP CORPORATION,

Appellant.

ON PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH, *Circuit Judges*, and NEALON, *District Judge*.

Opinion of the Court

(Filed—May 20, 1964)

PER CURIAM.

The petition for rehearing will be denied.

Appendix A

HASTIE, *Circuit Judge*, with whom SMITH, *Circuit Judge*, joins, dissenting.

Under this decision "unseaworthiness" becomes a liability-imposing word without rational meaning or conceptual scope.

Heretofore, to me at least, unseaworthiness has signified some unfit, unsound or unsafe condition of a vessel or its gear or equipment. A vessel may be unseaworthy because of a structural defect, or because it is improperly manned or because its equipment is defective or inadequate in some way. But, as I understand the facts in this case, the vessel and its gear were not defective in any way. The winch and cable, part of the ship's gear, involved in this accident, were sound and worked perfectly. The trouble was that stevedores, not in the employ of the ship, negligently undertook to move one railroad car from its unloading position on the pier alongside the ship by bumping it with a train of oncoming cars. They used the ship's winch and cable to put the bumping cars in motion. This procedure may well have been active negligence by the stevedores, but it involved no structural or operational defect of the gear, and no unfitness to move cargo carrying cars. If a ship is to be liable for any negligence of a stevedore or any other third person in misusing its gear, I think the court should say so and should offer some justification other than an anomalous characterization of the gear as unseaworthy.

I think the Supreme Court has never supported a finding of unseaworthiness which could not be rationalized as involving some structural or functional unfitness of vessel or gear for its intended use. If any decision of an inferior court goes as far as this one, we certainly are not obligated to follow it.

Appendix A

Unable to find any satisfactory rationalization for this decision or to comprehend its scope, I fear that the bar and the maritime community will find that our ruling leaves confused and doubtful the question of the ship's liability in many situations, in which it heretofore has seemed clear that no liability existed. Does this decision mean that when a pilot negligently maneuvers a ship against a bridge or a pier, the steering apparatus is unseaworthy? If a stevedore negligently allows tackle to fall to the deck injuring someone, is the gear unseaworthy? If one passenger injures another by carelessly using some sports equipment supplied by the ship is this equipment unseaworthy? If it seems ridiculous to apply the concept of unseaworthiness to such cases as these, I think the incongruity lies not with the choice of examples but with the present decision which seems to embrace all such situations.

In my judgment, there should be a rehearing of this appeal before the court en banc to permit full consideration whether we wish to make this puzzling extension of liability without fault and, if so, to provide a rationalization of our ruling and some definition of its scope.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,410

JAMES THOMPSON,

v.

CALMAR STEAMSHIP CORPORATION,
Appellant.

APPEAL FROM JUDGMENT OF THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

Argued October 24, 1963

Before STALEY and GANEY, *Circuit Judges*, and NEALON, *District Judge*.

Opinion of the Court

(Filed—April 15, 1964.)

By NEALON, *District Judge*

Plaintiff, James Thompson, brought suit against defendant, Calmar Steamship Corporation, seeking to recover damages for injuries allegedly sustained as a result of defendant's negligence and for breach of the warranty of seaworthiness under the principles of maritime law. The jury having returned a verdict for plaintiff in the amount of $118,000.00, defendant has filed this appeal.

Appendix B

The relevant facts are well summarized in the opinion of the Court below, as follows:

> "Plaintiff was one of a stevedoring company's gang of longshoremen employed to load shipments of steel aboard the defendant's vessel, lying anchored in navigable water. The steel was being loaded directly from gondola freight cars in which it had been shipped and which were on the pier. During the evening and early morning hours of December 27-28, 1957, the work of loading had been going on. A number of cars had been unloaded and by approximately 3:30 to 4:00 A.M., there were six cars on the pier. The first in line, Car No. 1, had been unloaded some time before and the longshoremen had just completed the unloading of Car No. 2. It was necessary to move Car No. 2 from its position under the boom of the vessel which was opposite the No. 1 hatch and to bring Car No. 3 into its place. There was no shifting engine available to move the cars. The longshoremen therefore attached the bull line from the No. 3 hatch of the vessel to three loaded cars (Nos. 4, 5 and 6) which were coupled together about 150 to 300 feet away, and by employing the bull winch and utilizing the power of the ship's engines jerked the three loaded cars forward. Using the three cars as a kind of battering ram, as plaintiff's counsel well described it, they struck Car No. 3, driving it forward so that if would bump Car No. 2 out of its position. It was necessary, of course, to bring Car No. 3 to a stop when it reached the proper position under the boom. For this purpose one longshoreman stood near the track with chocks and another, the plaintiff, was stationed at the brake of Car No. 3.

Appendix B

"When the ship's line, drawn by the winch pulled the three coupled freight cars into motion they struck Car No. 3 with such force that plaintiff was catapulted to the opposite side of the car and fell between it and the platform, on the side away from the vessel. Two of the wheels of Car No. 3 ran over his left leg and amputated it."

Before considering the arguments of appellant, certain basic propositions must be established. It is elementary that the owner of a ship is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment and it has been settled law in this Country ever since The Osceola, 189 U. S. 158 (1903). There can be no dispute also, that longshoremen, engaged in the service of the ship, are entitled to the same protection against unseaworthiness which members of the ship's crew would enjoy. Seas Shipping Company v. Sieracki, 328 U. S. 85 (1946). McKnight v. N. M. Paterson & Sons, Ltd., 286 F. 2d 250 (6th Cir. 1960). The work of loading and unloading the ship is, as a matter of law, the work of the ship's service, performed until recent times by members of the crew. Hagans v. Ellerman & Bucknall Steamship Company, 318 F. 2d 563 (3d Cir. 1963). The shipowner cannot escape liability by the simple means of delegating the loading function to an independent contractor. "* * * that the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection." Seas Shipping Company v. Sieracki (supra). Further, the unseaworthiness of a vessel or its equipment may arise from acts of the longshoreman crew or, indeed, of the injured longshoreman himself. Grillea v. United States, 232 F. 2d 919 (2d Cir. 1956); Knox v. United States Lines Company,

294 F. 2d 354 (3d Cir. 1961); Smith v. Lauritzen, 201 F. Supp. 663 (E. D. Pa. 1962).

If the longshoreman is actually engaged in the service of the ship, it is immaterial whether the accident caused by the vessel's unseaworthiness occurs away from the ship on the pier. Gutierrez v. Waterman Steamship Corporation 373 U. S. 206 (1963). As Mr. Justice White observed in Gutierrez:

> "Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of Extension of Admiralty Jurisdiction Act, 46 USC §740, swept it away when it made vessels on navigable water liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land.' Respondent and the carrier amici curiae would have the statute limited to injuries actually caused by the physical agency of the vessel or a particular part of it—such as when the ship rams a bridge or when its defective winch drops some cargo onto a longshoreman. Cf. Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (C. A. 2d Cir.); Hagans v. Farrell Lines, Inc., 237 F. 2d 477 (C. A. 3rd Cir.). Nothing in the legislative history supports so restrictive an interpretation of the statutory language."

The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability, and this is true whether the unseaworthy condition be of a permanent or merely a temporary nature. Mitchell v. Trawler Racer, Inc., 362 U. S. 539 (1960); Alaska Steamship Co.,

Inc. v. Petterson, 347 U. S. 396 (1954). "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. *The method of loading her cargo*, or the manner of its storage might be improper." (emphasis supplied) Morales v. City of Galveston, 370 U. S. 165 (1962).

Here we are faced with a highly questionable loading procedure. Plaintiff was a member of a longshoremen's gang engaged in loading a vessel, and in the course of doing so it fell to him to participate in an operation on land, but one intimately associated with the use of the ship's equipment, i.e., the bull winch and the bull line. As Judge Freedman so aptly stated in his opinion in the District Court:

> "What occasioned the accident and brought the warranty of unseaworthiness into operation was not the plaintiff's position on a freight car on a pier. It was rather the additional element of the use of the vessel's equipment and the physical attachment of the ship's line to the three loaded freight cars so as to make them the hammerhead to strike Car No. 3 into position by the application of the steam power of the ship's engines and the tightening of the line by the bull winch. A longshoreman injured by a defective ship's line cast from the vessel to the pier surely may be said to have been injured by unseaworthy ship's gear. Equally so would unseaworthiness exist if the ship's defective gear caused his injury by the fall of cargo which in itself was harmless. Here the otherwise harmless freight cars became animated by the power of the ship's engines and the physical connection of the ship's line. There is no insulation of unseaworthiness of the ship's line and its attachments merely because the attach-

ments were not in themselves defective if used in some other manner." Thompson v. Calmar Steamship Company, 216 F. Supp. 234 (E. D. Pa. 1963).

In Robillard v. A. L. Burbank & Co., Ltd., 186 F. Supp. 193 (S. D. N. Y. 1960) (cited with approval in Gutierrez), the longshoreman crew used the vessel's winches, which the Court found were operating properly, to unload lumber from the vessel. The lumber was being unloaded from the center of the deck at first and the Second Mate was dissatisfied with this procedure and so informed the stevedores inasmuch as he feared that the heavy loads passing over the remainder of the cargo on the side of the deck might "knock it off the dock." He remonstrated with the stevedores, but they continued their operation, and while one of the loads passed over the side it dislodged serveral pieces of the stacked lumber which fell over and hit plaintiff longshoreman, who was working on the dock. Circuit Judge Friendly, sitting by designation, citing Mitchell, Petterson, and Grillea, held that the unsafe method of unloading the lumber rendered the equipment unseaworthy.

In Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (2d Cir. 1950), the longshoremen crew was attempting to lift a heavy metal "pontoon" from the dock by fastening it with two "bridles" to the ship's winches, booms and falls. The pontoon fell and struck a longshoreman who was assisting in the operation. According to the Court's opinion:

> "Each 'bridle' consisted of two lengths of wire cable, each length having a hook at one end, and the other end being fastened to a single common ring. Each hook was passed into a 'slot' at one corner of the 'pontoon,' and the common ring was passed into the hook at the end

of the fall. In this way each 'bridle' could lift the 'pontoon' at two of its corners, and two 'bridles' could lift it at all four corners. Instead of making the two rings fast to each other, so as in effect to make a single 'bridle' with four lengths of wire, the rings were left separate on the hook; and in consequence after the winch had lifted the 'pontoon' a short distance from the dock, it tilted, the two rings separated and one of them slipped out of the hook, dropping one end of the 'pontoon.' "

The Court held that the use of two "bridles" instead of one was unsuitable for the purpose, and made the ship's gear pro tanto unseaworthy. If the use of two bridles instead of one was unsuitable for the purpose of raising the "pontoon" into place, then certainly while loading the defendant's cargo, the dangerous method of bumping gondola cars into position under the hammer as utilized in this case was unsuitable for that purpose.

Moreover, the jury heard the testimony of expert witnesses in the case and had the opportunity of hearing Mr. John Stange, a longshoreman and supervisor of longshoremen for more than forty-five years. He was asked, "Do you have an opinion as to the reasonable safety of using three loaded cars to bump or push No. 3 car under the hammer?" He answered, "Yes * * * well, the three cars shouldn't hit the one car that is one thing * * * Because they are too heavy, and they gain more weight in momentum, and when they hit the Car No. 3, which was loaded with plate, why it is like hitting a brick wall." He then, in answer to a question, enumerated four different methods or devices "other than using the ship's gear which can safely and adequately move railroad cars into the car-

spotting position." With this testimony before it the jury could and did properly find, from the facts, that the method used to load the ship's cargo created an undue risk to those called upon to load it, making the vessel unseaworthy, and that the unseaworthiness was the cause of Thompson's injury. See Hagans v. Ellerman & Bucknall Steamship Company (supra).

As to the negligence phase of the case, the jury was justified in returning a verdict in favor of the plaintiff on the theory that the defendant was negligent in not furnishing plaintiff with a safe place to work.

The defendant contends that it had no control over the pier and thus could not be responsible for an injury occurring thereon. In Gutierrez (supra), the United States Supreme Court refused to find that any failure to control the pier would exculpate the vessel owner from his non-delegable duty to furnish longshoremen working in the service of his vessel a safe place to work. The Court went on to say: "The man who drops a barrel out of his lift need not control the sidewalk to be liable to the pedestrian when the barrel hits." Defendant allowed the cargo to be loaded in a dangerous and defective manner. The night mate was in charge of the vessel and witnessed the operation resulting in this accident. "The shipowner has a duty not to permit its ship's unloading activities, which can affect people on the pier, to be carried on in such a way that subjects those people in the area of these activities to an unreasonable risk of harm." Fisher v. United States Lines Company, 198 F. Supp. 815 (E. D. Pa. 1961). In Beard v. Ellerman Lines, Ltd., 289 F. 2d 201 (3d Cir. 1961), this Court pointed out that "It is settled law that Ellerman owed to Beard the obligation to provide him with a safe place to work, and its failure to do so constituted negligence. It is equally

settled that Ellerman was under a duty to use methods which complied with the standard of reasonable care in the discharge of its cargo, and to forbid the use of a discharge method by the stevedore of its selection, which did not conform to a standard of reasonable care." The standard of reasonable care required in discharging the cargo also applies with equal force to the loading of the cargo. Defendant had an absolute and non-delegable duty of care toward the plaintiff not to create this risk to him, which it failed to meet. When this lack of care culminated in plaintiff's injury, defendant became legally liable to compensate him for the harm. See Gutierrez v. Waterman Steamship Corporation (supra).

The defendant further complains that the trial court erred in rejecting the testimony of witnesses Shields and Hedemann. The purpose of Shield's testimony was to attempt to show that the work being done by plaintiff was not work which had been performed traditionally by the ship's crew. That the work inextricably associated with the loading of the vessel is, as a matter of law, the work of the ship's service, was clearly established in Hagans (supra), and recently confirmed in Gutierrez (supra). Consequently, the testimony of Shields would do no more than confuse the jury and was properly excluded. As to the witness Hedemann, a pre-trial order gave the defendant leave to amend its pre-trial memorandum by adding the names of expert witnesses. The defendant filed a supplemental pre-trial memorandum designating Hedemann as a witnesss. This clearly implied that he was to be an expert witness. At the trial of the case he was called as a factual witness, purportedly to testify that he arrived at the scene of the accident immediately after it happened and when he asked what had happened he was told by one of the longshoremen that

Thompson slipped off the platform while trying to apply the brake and that the ship's gear was not involved. Plaintiff's plea of surprise was well taken. The witness was an employee of a subsidiary of the same parent corporation as is the defendant and was on duty at the time of the accident. The very next day the scene was visited by appellant's counsel and a court reporter who took statements from a number of witnesses, including members of the crew and the stevedore gang. Hedemann was not referred to in any of the answers to interrogatories, although if he were a factual witness, a number of interrogatories would have required that he be identified. The opinion of the District Court adequately handles the question and is, in part, adopted here:

> "Under our Rules such a factual dispute must have been specified in the pretrial memorandum. This was not done. Moreover, the defendant's answer to plaintiff's interrogatory No. 1(a) alleged that 'defendant has information that plaintiff was injured when he fell from a railroad car and was run over by that car or another'. There plaintiff had every right to rest on the assurance that defendant would make no claim that he fell from the adjoining platform rather than from a railroad car.
>
> "A judicial proceeding is a reasoned effort to ascertain the truth. The rejection of the evidence of a witness is therefore always difficult. Inevitably the Court is called upon to balance the desirability of having all possible evidence made available at the trial, against the need to maintain a system of orderly procedure for preparation and trial * * * the only excuse offered by the defendant is that it was uncertain that the witness would be available at the time of trial. In these cir-

cumstances it would be wholly contrary to the spirit of our Rules and destructive of orderly procedure to have permitted him to testify."

Defendant also asserts that the verdict was excessive. At the time of the trial Mr. Thompson was fifty-three years of age. He had a life expectancy of twenty and one-half years. If he worked until he was sixty-five, he would have twelve years of future earning power. There was evidence introduced, which the jury had every right to and obviously did believe, that plaintiff was, shortly after the accident, to receive steady employment as a longshoreman. Also in evidence were the earnings of fellow longshoremen and the increased hourly rates since the time of the accident. That his earning capacity has been seriously impaired cannot be questioned. When one considers further his disfigurement, impairment in ability to walk, and pain, suffering, and inconvience, the award cannot be said to be so shockingly excessive that the interests of justice cry out that it be set aside or reduced.

The appellant speaks of other "cumulative errors" in the case, but after a thorough review of the record and a careful weighing of the arguments of the parties, we perceive none.

Consequently, the judgment of the District Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 991

ALFONSO SPINELLI,
Libellant-Petitioner,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,
Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Respondent.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING	1
SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI	3
Reasons for Granting Rehearing and Issuing the Writ	4
Conclusion	4
Certificate of Counsel	5

Cases Cited

Bowden v. Fort Smith, 316 U. S. 584	2
Ferrante v. Swedish American Lines, 331 F. 2d 571 (1964)	2, 4
Helvering v. Southwest Consolidated Corporation, 316 U. S. 710 (1941)	2
Scott v. Isbrandtsen Co., 327 F. 2d 113 (4th Cir. 1964)	4
Thompson v. Calmar Steamship Corporation, 331 F. 2d (3rd Cir. 1964)	4

Rule Cited

Rule 58	2, 5

IN THE

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—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

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Respondent.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed Second Petition for Rehearing of the order of this Court denying the petition for writ of *certiorari* in this case, entered on May 18, 1964, on which order Rehearing was denied June 22, 1964. Rehearing is sought at this time on the sole ground that, as is set forth in the annexed petition, a petition for writ of *certiorari* to the Court of Ap-

peals for the Third Circuit in the case of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (1964) has been filed with the Court July 14, 1964 (No. 275 of the October Term, 1964). The rule of law followed by the Third Circuit in *Ferrante* is directly contrary to that followed by the Second Circuit in this case and this conflict of decisions in the Courts of Appeals should be resolved by this Court. Although Rule 58 proscribes the filing of consecutive petitions for rehearing, the Court's power to rescind the denial of *certiorari* is invoked under the authority of *Helvering* v. *Southwest Consolidated Corporation*, 316 U. S. 710 (1941) and *Bowden* v. *Fort Smith*, 316 U. S. 584, 589.

IN THE

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INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of May 18, 1964, denying the petition for writ of *certiorari* and the subsequent denial of rehearing entered June 22, 1964, and that a writ of *certiorari* issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed on or about April 3, 1964 and the petition for rehearing filed on or about June 10, 1964.

Reasons for Granting Rehearing and Issuing the Writ

The petition for Rehearing was denied on June 22, 1964 and on July 14, 1964, petition for writ of *certiorari* to the Court of Appeals for the Third Circuit in the case of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (1964) was filed with this Court.

The decision in *Ferrante* is contrary to that of the Court of Appeals for the Second Circuit in this case, as are the decisions in *Thompson* v. *Calmar Steamship Corporation*, 331 F. 2d (3rd Cir., 1964) and *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4th Cir., 1964).

In the event the Court grants *certiorari* in the *Ferrante* case, it is respectfully urged that this case should be considered along with it so that the issue of unseaworthiness raised by these cases may be fully considered and the law clarified for the guidance of all courts called upon to interpret and apply maritime law.

CONCLUSION

For reasons set forth above and in the petitions for writ of *certiorari* and rehearing, and in the reply of the petitioner to the briefs of the respondents, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of *certiorari* issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

NATHAN BAKER,
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BAKER, GARBER & CHAZEN,
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Certificate of Counsel

I hereby certify that the foregoing second petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

NATHAN BAKER,
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ALFONSO SPINELLI,

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ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

BRIEF OF RESPONDENT, ISTHMIAN STEAMSHIP COMPANY, IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING OF HIS PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

	PAGE
POINT I—Petitioner's motion is an obvious attempt to circumvent Supreme Court Rule 58(4) which proscribes the filing of consecutive petitions	1
POINT II—Absent most unusual developments and compelling reasons therefor, the court should not reverse itself by granting a rehearing and issuing a writ of certiorari	2
CONCLUSION	4

Table of Cases.

	PAGE
Ferrante v. *Swedish American Lines*, 331 F. 2d 571 (1964)	2, 3
Mitchell v. *Trawler Racer*, 362 U. S. 539 (1960)	4
Scott v. *Isbrandtsen Co.*, 327 F. 2d 113 (4th Cir. 1964)	3
Thompson v. *Calmar Steamship Corporation*, 331 F. 2d 657 (3rd Cir. 1964)	3

IN THE

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INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

BRIEF OF RESPONDENT, ISTHMIAN STEAMSHIP COMPANY, IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING OF HIS PETITION FOR WRIT OF CERTIORARI.

POINT I.

PETITIONER'S MOTION IS AN OBVIOUS ATTEMPT TO CIRCUMVENT SUPREME COURT RULE 58(4) WHICH PROSCRIBES THE FILING OF CONSECUTIVE PETITIONS.

It is the gist of petitioner's motion that although he is proscribed by Rule 58 from filing consecutive petitions for rehearing, nevertheless, inasmuch as a petition for certi-

orari has been filed in the case of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (1964) (No. 275, October Term, 1964), this should be sufficient reason for the Court to overlook the Rule. Petitioner is making a third attempt at obtaining certiorari on the very same alleged conflicts that he urged in his previous attempts.

It is not denied that the Court has the power to rescind its previous denial for a writ of certiorari. However, such recision should be made only under the most unusual circumstances and for the most compelling of reasons, such as a supervening case decided by one Court of Appeals which is clearly contrary to the law as stated in a different Court of Appeals, or as decreed by the Supreme Court, which circumstances or reasons do not exist herein, and not decisions already brought to the attention of the Court in previous attempts.

Petitioner contends that there is a conflict between the Court of Appeals for the Third Circuit as evidenced by the *Ferrante* case and the Court of Appeals for the Second Circuit as evidenced by the instant case. Just because petitioner alleges a conflict does not make it so. Each case was decided on its own facts.

POINT II.

ABSENT MOST UNUSUAL DEVELOPMENTS AND COMPELLING REASONS THEREFOR, THE COURT SHOULD NOT REVERSE ITSELF BY GRANTING A REHEARING AND ISSUING A WRIT OF CERTIORARI.

The original petition for a writ of certiorari was denied on May 18th, 1964. Thereafter, on June 22nd, 1964, the Court denied the petition for a rehearing.

In support of his third petition, petitioner brings nothing new to the Court's attention. There have been no new or unusual developments in the law in any of the Circuit Courts since this Court denied the original petition. Furthermore, the cases advanced by petitioner have all been brought to the Court's attention on previous occasions. *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4th Cir. 1964) has been called to the Court's attention on four (4) occasions[1]; *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (1964) has been brought to the attention of this Court by petitioner three (3) times[2], and *Thompson* v. *Calmar Steamship Corporation*, 331 F. 2d 657 (3rd Cir. 1964), has been brought to the Court's attention once before[3].

Moreover, respondent's brief in opposition to the petition for a writ of certiorari distinguished both *Ferrante* and *Scott*. The *Thompson* case is also distinguishable. *Thompson* presented a *factual* issue which was decided adversely to the shipowner. *Spinelli*, too, presented a *factual* issue decided in favor of the shipowner.

Of course, this Court has power to review the *Ferrante* case on the ground that it was improperly decided by the Court of Appeals for the Third Circuit. However, inasmuch as this case was properly decided by the Courts below, and because this Court has twice refused to grant

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[1] Original petition, pp. 10-13;
Letter of April 20, 1964, to the Clerk by petitioner's counsel;
Reply by petitioner to briefs of respondents, p. 2;
Petition for rehearing of order denying petition for writ of certiorari, p. 2;

[2] Letter of April 20, 1964, to the Clerk by petitioner's counsel;
Reply by petitioner to briefs of respondents, p. 2;
Petition for rehearing of order denying petition for writ of certiorari, p. 2;

[3] Petition for rehearing of order denying petition for writ of certiorari, p. 2;

a writ of certiorari, the findings of the Courts below that the vessel and its equipment were reasonably fit for their intended purposes, in accordance with the teachings laid down by *Mitchell* v. *Trawler Racer*, 362 U. S. 539 (1960), should not be disturbed.

Conclusion.

Since there is no merit to the motion, no important question of law presented to the Court, and the reasons for granting rehearing are so insufficient and uncompelling, the relief sought by petitioner should be denied and the matter brought to rest.

Respectfully Submitted.

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